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73-1651
In the Supreme Court of the United States

OCTOBER TERM, 1973

THEODORE J. ISAACS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	4
Statement	4
The Indictment	5
Pre-Trial Motions	9
Background	11
Initial Offer	13
Interim Activities	16
Knight's Purchase of CHR stock	17
Consummation of CTE purchase	17
Kerner's and Isaacs' purchase of CHR stock	18
Substitution of BJC stock for CTE stock	19
Disposition of shares	20
Reasons for Granting the Writ	21
1. Misjoinder of defendants, applicability of Rule 8(b), Federal Rules of Criminal Procedure, and interpretation of Rule 8(b) in contrast to Rule 8(a)	21
2. Prejudice arising from joint trial with co-defendant charged with perjury, where that co-defendant is principal witness for the defense	24

PAGE

3. Existence of scheme to defraud where only loss is the State's right to "honest and faithful services 29

4. Failure to instruct as to, and lack of proof of, intent to use interstate facilities 34

Conclusion 38

AUTHORITIES CITED

Cases

Bradford v. United States, 5th Cir. 1942, 129 F.2d 274 29

Bruton v. United States, 391 U.S. 123 (1968) 23

Cupo v. United States, D.C.Cir. 1966, 359 F.2d 990 21

Epstein v. United States, 6th Cir. 1949, 174 F.2d 754 30

Farmer v. United States, 2nd Cir. 1915, 223 Fed. 903 34

Glasser v. United States, 315 U.S. 60 35

Grunewald v. United States, 353 U.S. 391 (1957) 23

Ingram v. United States, 4th Cir. 1959, 272 F.2d 567 21

King v. United States, 1st Cir. 1966, 355 F.2d 700 21

Krulewitch v. United States, 336 U.S. 440 (1949) 23

Lutwak v. United States, 344 U.S. 604 (1952) 23

Mazurosky v. United States, 9th Cir. 1939, 100 F.2d 958 34

Metheany v. United States, 9th Cir. 1966, 365 F.2d 90 21

Michelson v. United States, 335 U.S. 469, 482 (1948) 28

Nassif v. United States, 8th Cir. 1966, 370 F.2d 147 .. 37

Nye & Nissen v. United States, 336 U.S. 613 35

Pearson v. United States, 6th Cir. 1951, 192 F.2d 681 .. 28

PAGE

Pinkerton v. United States, 328 U.S. 640 (1945) 35
Post v. United States, D.C. Cir. 1968, 407 F.2d 319 31
Rewis v. United States, 401 U.S. 808 (1971) 33
Roberson v. United States, 5th Cir. 1957, 249 F.2d 737 28
Screws v. United States, 325 U.S. 91 (1944) 35
Shushan v. United States, 5th Cir. 1941, 117 F.2d 110 29
United Brotherhood of Carpenters, etc. v. United States, 330 U.S. 395 (1946) 35
United States v. Alsondo, 2nd Cir. 1973, 486 F.2d 1139, cert. granted *sub nom* United States v. Feola, No. 73-1123, Apr. 15, 1974 37
United States v. Barnes, 6th Cir. 1967, 383 F.2d 287 ..36, 37
United States v. Bass, 404 U.S. 336 (1971) 33
United States v. Bush, No. 74 CR 135 33
United States v. Carter, 3rd Cir. 1968, 401 F.2d 748 22
United States v. Crimmins, 2nd Cir. 1941, 123 F.2d 271 37
United States v. Dorfman, S.C. N.Y. 1971, 335 F.Supp. 675 31
United States v. Faser, E.D. La. 1969, 303 F.Supp. 380 31
United States v. Fellabaum, 7th Cir. 1969, 408 F.2d 222 36
United States v. Friedman, 9 Cir. 1971, 445 F.2d 1076 22
United States v. George, 7th Cir. 1973, 477 F.2d 508 ..31, 32
United States v. Gill, 7th Cir. 1973, 490 F.2d 233 25
United States v. Granello, 2 Cir. 1967, 365 F. 2d 990 23
United States v. Hall, 4th Cir. 1965, 342 F.2d 849 37

PAGE

United States v. Hoffa, S.C. Fla. 1962, 205 F.Supp. 710 30

United States v. Marquez, 2nd Cir. 1971, 449 F.2d 89 .. 36

United States v. Miles, 7 Cir., 401 F.2d 65, 67 34

United States v. Pacente, 7th Cir. 1973, 490 R.2d 661 25

United States v. Pereira, 347 U.S. 1 (1954) 34

United States v. Procter and Gamble Co., D.C. Mass. 1942, 47 F. Supp. 676 30

United States v. Roselli, 9th Cir. 1970, 432 F.2d 879 ..21, 35, 36

United States v. Ruthstein, 7th Cir. 1969, 414 F.2d 1079 36

United States v. Sherman, 2nd Cir. 1948, 171 F.2d 619 .. 37

United States v. Staszcuk, No. 73-1869, U.S. Ct. of Ap. for the 7th Cir. 33

United States v. Sweig, 2nd Cir. 1971, 441 F.2d 114 22

United States v. Vilhotti, 2nd Cir. 1971, 452 F.2d 1186 .. 37

United States v. Zimmerman, 7 Cir., 326 F.2d 1, ... 35

Ward v. United States, D.C. Cir. 1961, 289 F.2d 877 21

Weiler v. United States, 323 U.S. 606 (1944) 35

Other Authorities

Rule 8(a) Fed.R.Cr. Proc. 21, 22, 23, 24

Rule 8(b) Fed.R.Cr. Proc. 21, 22, 23, 24

18 U.S.C. §371 34

8 Moore's Federal Practice (Cipes ed.), ¶ 8.06, p. 8-23 .. 21

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Theodore J. Isaacs, prays that a Writ of Certiorari be issued to review the final judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on March 28, 1972.

OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Illinois (*United States* v. *Isaacs, et al.*, N.D. Ill. 1972, 347 F.Supp. 743; *United States* v. *Isaacs, et al.*, N.D. Ill. 1973, 347 F.Supp. 763; *United States*

v. *Isaacs and Kerner,* N.D. Ill. 1973, 364 F.Supp. 895) and of the special panel of the United States Court of Appeals for the Seventh Circuit (*United States* v *Isaacs,* 7th Cir. 1974, ... F.2d ....., supplemental opinion on rehearing, ... F.2d .....) are all reprinted in a separate Joint Appendix filed by Otto Kerner, Jr., Petitioner in No. ....., and this Petitioner.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1974. A timely Petition for Rehearing was denied on March 28, 1974. By Order entered April 19, 1974, Mr. Justice Rehnquist extended the time for filing this Petition to and including May 6, 1974. The jurisdiction of this Court is evoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether counts charging Kerner alone with committing perjury before the Grand Jury, with making false statements to IRS Agents—all during the investigation of this case—and with filing a tax return containing false statements concerning the acquisition and disposition of stock allegedly received as a bribe, and whether a count charging Isaacs alone with filing a tax return containing false statements concerning the same general matters were properly joined with counts charging both defendants with conspiracy and substantive offenses growing out of their alleged receipts of bribes, where the Government tacitly conceded that the perjury, false statement and false returns were not part, or in furtherance, of the conspiracy?

A. Whether joinder in this multiple-defendant case is governed by Rule 8(a) or Rule 8(b), Federal Rules of Criminal Procedure, or a combination of both?

B. Whether Rule 8(a)'s "same act or transaction or * * * two or more acts or transactions connected together or constituting parts of a common scheme or plan" test is identical to Rule 8(b)'s "same act or transaction or * * * same series of acts or transactions constituting an offense or offenses" test; or whether Rule 8(b) embodies a stricter standard by reason of its "constituting an offense or offenses" language?

C. Whether joinder here may be sanctioned on the ground that the proof necessary to establish independent counts was pertinent to proof of other, joint counts?

2. Whether a joint trial of counts charging Kerner with perjury and false statements prejudiced this Petitioner by informing the jury that the Grand Jury, who had heard Kerner's testimony, determined he was a liar, where Kerner was the principal defense witness, this Petitioner did not testify, and this Petitioner's defense was almost totally dependent upon Kerner's credibility?

3. Whether a public official's acceptance of a bribe, in violation of state law, can be characterized as a scheme to defraud the public of his honest and faithful services and the "secret profits" represented by the bribe payment, where there is no showing of an actual loss or real detriment to the public?

4. Whether intent to use the mails and to use facilities of interstate commerce is an essential element of a conspiracy to violate Sections 1341 and 1952 of Title 18?

A. Whether the jury must be instructed that intent to use interstate facilities and to use the mails is an essential element of conspiracy to violate the Travel Act and the mail fraud statute?

B. Whether conviction of a federal conspiracy to violate the Travel Act can stand in the absence of adequate proof of the use of interstate facilities and in the absence of proof of intent to use interstate facilities?

STATUTES AND RULES INVOLVED

Pertinent statutes and rules are printed in the Joint Appendix filed by Petitioners Kerner and Isaacs. Those statutes and rules are:

18 U.S.C.§371—The Conspiracy Statute.
18 U.S.C. §1341—The Mail Fraud Statute.
18 U.S.C. §1952—The Travel Act.
Rule 8, Federal Rules of Criminal Procedure, 18 U.S.C.A.
Rule 14, Federal Rules of Criminal Procedure, 18 U.S.C.A.
Illinois Revised Statutes, Chapter 38, § 33-1—Bribery.

STATEMENT

Petitioner, Otto Kerner, Jr., Petitioner in No. ....., William S. Miller, Faith McInturf and Joseph Knight were charged in a nineteen-count indictment, returned by the United States Grand Jury for the Northern District of Illinois, with various offenses against the United States arising out of their alleged activities on behalf of certain Illinois racing interests, said to have been in return for bribes of racing stock worth, to Isaacs and Kerner, more

than $150,000 each. Joseph Knight was severed because of ill health which, as all parties agreed and as the jury was instructed, precluded his being called as a witness for either side during the trial of this cause.

Subsequent to the return of the indictment William Miller and Faith McInturf entered into an immunity agreement with the Government and, by virtue thereof, agreed to testify on behalf of the Government in this and other prosecutions.[1]

Trial commenced before the Honorable Robert L. Taylor and a jury on January 3, 1973. Jury verdicts finding Kerner and Isaacs guilty of all counts in which they were charged were returned on February 19, 1973. Following appropriate post-trial motions, the District Judge entered judgments of acquittal with respect to Counts 5, 7, 10, 11 and 12 (the first charging a substantive travel act violation, and the remainder charging substantive mail fraud violations), and sentenced Isaacs to concurrent terms of three years on each of the remaining counts, subject to 18 U.S.C. 4208(a) 2. Fines of $10,000 on each of Counts 1, 2, 3, 4 and 18 were also imposed. (IV R. 250).[2]

The Indictment

Isaacs was named in fifteen of the nineteen counts. Count 1 alleged that the five named defendants together with unnamed other persons—revealed in a Bill of Particulars subsequently filed, to be Marjorie Everett—con-

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[1] Miller was one of two principal Government witnesses. Faith McInturf did not testify.

[2] "..... R. ....." references are to the volume and page of the Original Record below.

spired during a period beginning prior to January, 1961 and continuing to the date of the indictment (December 15, 1971) to commit two principal offenses against the United States:

> "To travel in interstate commerce, to use facilities in interstate commerce, including national banks, the Federal Reserve and its member banks, and to use the United States Mail, with intent to distribute the proceeds of bribery as that term is defined in Ill. Rev. Stat., ch. 38, sec. 33-1 * * *" in violation of 18 U.S.C. § 1952;
>
> "To knowingly and willfully use the United States mails and to cause the United States mails to be used in furtherance of a scheme to defraud," in violation of 18 U.S.C. § 1341.

This scheme to defraud was described as having four facets: (1) to defraud the State of Illinois and its citizens of their right to have the State's business and the administration of its laws conducted honestly, and free from undue influence, bribery and conflict of interest; (2) to defraud the State and its citizens of their right to the loyal services and performance of official duties by Miller and Kerner in their respective official capacities as Chairman of the Illinois Racing Board and Governor of the State of Illinois; (3) to defraud the State and its citizens of "secret profits" received by Miller and Kerner in the performance of their official duties; (4) and to defraud racing associations in Illinois of their right to obtain racing dates from the Illinois Racing Board free from corruption, bribery, official misconduct, conflict of interest and fraud.

Counts 2 through 5 charged all five defendants with substantive violations of 18 U.S.C., Section 1952. After ver-

dict, petitioners were granted judgment of acquittal on Count 5; the Court of Appeals reversed Petitioners convictions on Count 2, 3 and 4, holding that "the interstate activity in this case [including the incidental use of a federally regulated banking facility] was inadequate to trigger § 1952." (App. p. 30a; see also App. p. 33a)

Counts 6 through 12 charged all five defendants with devising the scheme and artifices to defraud described in Count 1, and with causing the mails to be used in execution thereof. Count 6 was predicated upon Kerner's mailing a Form 1099 IRS Information Return to Marjorie Everett showing payment of interest by him to her. The Government claimed the interest payment, which was actually made, was spurious. (See Statement *infra* pp. 17-18)

Count 8 was based on the mailing of a $7,000 check, issued by Knight to Kerner as payment of net proceeds from the sale of Chicago Harness Racing stock, from Kerner's bank to the American National Bank and Trust Company in Chicago, which served as a depository for Kerner's bank. The majority of the Court of Appeals affirmed Petitioners' conviction on this count. Senior Circuit Judge Johnsen, dissenting in part, was "unable to agree with the majority's affirmance of Kerner's [and, presumably, Isaacs'] conviction of mail fraud under counts VIII and IX as to which the mailings occurred after August, 1966. Kerner [and, presumably, Isaacs] had by that time become the full beneficial owner[s] of race track stock involved in the bribery.*** The incidents after the use of the mails which occurred in relation to Kerner's disposition of the stock or his obtaining the money therefor, did not go to the completion of the bribery, as between Mrs. Everett and Kerner. *United States* v. *Maze* decided by the Supreme Court on January 8, 1974, seems to me to require reversal as to these two counts." (App. p. 64a)

Count 9, also the subject of Judge Johnsen's partial dissent, was based on Kerner's mailing to the First National Bank of Chicago a check representing a dividend declared and paid by Chicago Harness Racing to all shareholders.

Count 13 was based on the Racing Board's mailing a race date acceptance form to the Balmoral Jockey Club (BJC), which, in its November, 1967, application for 1968 racing dates, had failed to disclose Kerner's and Isaacs' beneficial ownership of stock, although the interest of their nominee was disclosed.

Count 14 charged Kerner alone with making false material declarations before the Grand Jury on June 10, 1971, with respect to testimony given during the Grand Jury's investigation leading to the return of the instant indictment. The count alleges that Kerner gave false answers with respect to certain conversations concerning racing dates he was alleged to have had while Governor.

Count 15 charged Kerner alone with making false statements to two Internal Revenue Service agents on July 15, 1970 during an interview conducted by them in the course of their investigation of this case. Kerner was charged with deliberately concealing his interest in Chicago Harness Racing (CHR).

Count 16 charged Kerner only with attempting to evade payment of his 1966 income taxes by failing to report his acquisition of CHR and Chicago Thoroughbred Enterprises (CTE) stock as a bribe in 1966.

Count 17 charged Kerner only with making false statements in his 1967 tax return by falsely reporting his gain on the sale and exchange of CTE and CHR stock as capital gain occurred in 1967, by falsely reporting that the CTE stock was acquired in 1962, and by falsely labeling CHR stock as the "Chicago Co."

Count 18 charged Isaacs alone with attempting to evade payment of his 1966 income taxes. This claim concededly rested on the Government's theory that Isaacs (as Kerner; see *supra* concerning count 16) had received a bribe and that this bribe should have been reported as ordinary income in 1966 rather than as a capital gain on the sale of the stock in 1967.

Count 19 charged Isaacs alone with making false statements in his 1967 tax return that his shares of CTE (identified as "BAJO") were acquired in November, 1962, that he had sold shares of "Chicago Company rather than CHR, that the gain on this sale was a capital gain, and that the sale of the CTE ("BAJO") was a capital gain.

Pre-Trial Motions

Prior to trial Isaacs moved that Counts 18 and 19, charging him alone with income tax violations, be severed from the trial of counts 1 through 13, and that Counts 14 through 17, charging Kerner alone with tax violations, false declarations to the Grand Jury and false statements to Internal Revenue Service agents, be tried separate and apart from the other counts. Both aspects of the motion were denied by the District Judge, who ruled that the joinder was proper under Rule 8 and that Isaacs was not prejudiced so as to warrant relief under Rule 14 of the Rules of Criminal Procedure. (*United States* v. *Isaacs,* N.D. Ill. 1972, 347 F.Supp. 743, 761; App. pp. 101a-103a)

With respect to Isaacs' joinder claim, challenging trial of Counts 14, 15, 17 and 19 with the remaining counts, the Court of Appeals held: "When multiple defendants are charged in the same as well as multiple counts, a challenge by a single defendant to joinder of offenses in which he is charged is governed by Rule 8(a). Conversely, when one or more defendants challenge joinder and do not restrict

their attack to those offenses which pertain solely to them, Rule 8(b) applies." (App. p. 49a) Thus, Kerner's challenge to the joinder of counts 14, 15, and 17 and Isaacs' challenge to the joinder of count 19 were viewed as governed by Rule 8(a):

> "The perjury and other offenses with which we are concerned have a logical relationship. They are all connected with, or arose out of, a common plan to corruptly influence the regulation of horse racing. The perjury charge against Kerner related to his involvement with the racing industry, and evidence of that involvement was pertinent to the proof of the other offenses. *** [T]he commonalty of proof suffices to establish that the offenses were 'connected together' for the purposes of Rule 8(a)." (App. p. 50a)

Considering Isaacs' claim of misjoinder of counts charging Kerner only, the Court held:

> "Multiple defendants may be joined if they have participated in the same series of acts or transactions. The conspiracy, Travel Act and Mail Fraud counts all bore on the underlying claim of bribery. The evidence to establish the counts in question was pertinent to proof of other counts." (App. p. 50a)

In response to Kerner's claim that he was prejudiced by the joint trial of the perjury and false statement counts, based primarily on *United States* v. *Pacente,* 7th Cir. 1973, 490 F.2d 661, the Court held that a "different situation" prevailed in this case and, "if our conclusions are at odds with *United States* v. *Pacente,* supra, we can only say that we disagree with that decision." (App. pp. 51a, 52a) Judge Johnson felt that *Pacente,* if followed, would "require reversal of all of Kerner's convictions, for failure of the trial Court to grant severance." (App. p. 64a)

Isaacs claim that he was prejudiced by denial of severance of these counts was dismissed with the observation that no abuse of discretion was shown inasmuch as the Dis-

trict Judge had "instructed the jury that evidence of Kerner's perjury should not be permitted to prejudice Isaacs." (App. p. 52a)

We set forth below only such facts as are necessary for a basic understanding of the case and the questions presented.

Background

During 1960, Marjorie Lindheimer Everett organized Chicago Thoroughbred Enterprises (CTE), which was financed by bank loans of several million dollars. Mrs. Everett owned 2,000 of the 3,000 shares of stock issued by CTE. She pledged her shares as collateral to secure CTE loans. Arlington Park Jockey Club and Washington Park Jockey Club, owners of Washington Park and Arlington Park race tracks respectively, and formerly controlled by Mrs. Everett's recently deceased father, became divisions of CTE. Mrs. Everett also owned stock in the Balmoral Jockey Club (BJC). (Tr. 1324-6)[3]

Miller, a friend of Mrs. Everett's father and then a member of the Illinois Racing Board, whose duties included allocation of thoroughbred racing dates, offered and agreed to help Mrs. Everett in the creation of her racing empire, and assisted her in obtaining the financing described above. (Tr. 2881-9; 5714)

The charges in this case, excepting those relating to perjury and false statements, directly related to the acquisition and disposition, by Isaacs and Kerner, of stock in CTE, BJC, and Chicago Harness Racing Company (CHR), a later-formed enterprise.

Kerner was the Democratic candidate for Governor of Illinois in 1960. Miller assisted in financing his campaign.

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[3] "Tr. .....", references are to the Transcript of Proceedings filed in the Court below.

Through Miller, Mrs. Everett's companies contributed to the campaign, which was managed by Theodore Isaacs. Isaacs' friendship with Kerner dated back to the late 1930's, during their service together in the Illinois National Guard. (Tr. 2871-95; 6166; 6193-5)

After Kerner's election, Isaacs was appointed Director of the Department of Revenue, where he served until September 15, 1963. (Tr. 6792) No part of the indictment or evidence introduced charged Isaacs with misconduct in the performance of his official duties. The Illinois Department of Revenue had no control over, or relationship with, racing in Illinois. Kerner also appointed Miller Chairman of the Illinois Racing Board (IRB), on which Miller had served for several years.

In 1961 Miller suggested to Mrs. Everett that she enter the harness racing business in order to generate more income from her race track properties. To facilitate this, proposed changes in Illinois law concerning racing corporations were supported by Miller in the Illinois Legislature and, with the Governor's signature, became law. (Tr. 2938-9; 5938-47)

CTE refurbished Washington Park to accommodate harness racing. The Washington Park Trotting Association (WPTA) was formed to run the meets. It entered into a lease with CTE contingent upon its receipt of racing dates. (Tr. 1367-9) In 1962, Mrs. Everett and Miller formed CHR for the same purpose as WPTA. CHR had the same relationship with CTE as did WPTA. The common shares of CHR, initially issued to several businessmen, were placed in a voting trust to insure Mrs. Everett's control of the organization. (Tr. 1518-9; 2421-3) Miller suggested to Mrs. Everett that 50,000 shares of CHR stock be kept available for distribution to persons whom he felt might help the company.

Initial Offer

Several versions of the October-November, 1962, events culminating in Isaacs' and Kerner's ownership of race track stock were received at trial. According to Mrs. Everett, Miller told her it was important for her to have a friend (Isaacs) in the Kerner Administration in order to insure favorable consideration for her ventures. He told her she should make racing stock available to Isaacs and Kerner. (Tr. 1381-4, 1390-1, 1808) According to Miller, the idea of offering stock was solely Mrs. Everett's, who first broached the subject by telling him she had earlier promised Isaacs she would set aside certain amounts of CTE and WPTA stock for Kerner and Isaacs. (Tr. 2941-6) Mrs. Everett denied this had occurred. (Tr. 6276-83)

According to Kerner, in late 1962 Joseph Knight—Illinois' Director of Financial Institutions—came to him with an opportunity to invest in Mrs. Everett's racing enterprises. Kerner told Knight to talk to Isaacs about participating in the investment. Kerner then spoke to Isaacs and told him to handle the transaction as he saw fit. (Tr. 6392-5)

Isaacs did not testify at trial. His Grand Jury testimony, portions of which were read into evidence by the Government and by the defense, revealed his version that Mrs. Everett had spoken to him during 1962 about the favorable growth and progress of CTE, in which she invited him to participate. Isaacs also recalled speaking with Miller about the subject and with Joseph Knight about the potential investment opportunity. (Tr. 5478-9, 5487, 5492)

According to Mrs. Everett, Miller called her on November 8, 1962, and asked her to send him a memorandum con-

firming her commitment to set aside stock for Kerner and Isaacs. (Tr. 1384)

According to Miller, Mrs. Everett called him, expressed concern about her public image, again referred to her wish to set aside stock which she had discussed with Isaacs and Kerner, and said she would discuss the matter with her attorney Senator Lynch. Miller professed surprise and dismay at Mrs. Everett's plans. Nevertheless, he told her he intended to be in Springfield the next day and promised, at Mrs. Everett's behest, to explore the situation with the Governor. Mrs. Everett told Miller she would deliver a memorandum to him setting forth her commitment. (Tr. 2941-6) Mrs. Everett also denied this version. (Tr. 6276-83)

Miller did receive Government's exhibit 1-2 from Mrs. Everett on November 8, 1962. That memorandum read:

> Dear WS:
>
> The following memo is to confirm our telephone conversation of today. At your earlier suggestion we have been holding for OK 25 shares of CTE common, $25,000; 10,000 shares of WPTA common, $10,000. For TI, 5 shares of CTE common, $5,000; 2,000 shares of WPTA common, $2,000.
>
> We did not issue the above as you had suggested that I hold this stock until we receive further instructions from you.
>
> For your further information, you will recall that the common stock of CTE at the time of merger had a value of $1,000 a share. I shall be pleased to either issue the above stock or hold it, or handle it in any manner you suggest.
>
> Kindest personal regards,
> Marj
>
> November 8, 1962

On November 9, 1962, Miller met with Governor Kerner and Isaacs. According to Miller, he told the Governor that Mrs. Everett, in her desire to be kind and in sympathy with the Governor's financial situation, had set aside 25 shares of CTE and 10,000 shares of WPTA for him, and 5 shares of CTE and 2,000 shares of WPTA for Isaacs. Kerner said: "That's very nice of Marj." (Tr. 2951)

Mrs. Everett testified she made stock available only because she felt Miller had pressured her, and she did not feel she could afford to displease him because of the power he wielded and the extent of her investment in her racing enterprises. (Tr. 1384-91, 1808)

According to Miller he conveyed Mrs. Everett's offer to Kerner and Isaacs because Mrs. Everett was in need of Kerner's and Isaacs' favor, was eager to ingratiate herself with them, and wanted to avoid any potential adversity in connection with racing dates being considered by the Harness Board. Miller conveyed the offer in order to cause Kerner to continue to look favorably upon Mrs. Everett and her enterprises. (Tr. 2952-3)

According to Kerner, he did not speak with Miller about Mrs. Everett's stock offer on November 9, or at any time. He acknowledged the November 9 meeting, but said its purpose was for Miller to advise him of the 1963 racing dates which the Racing Board would award. (Tr. 6440-41)

However her offer was communicated, Mrs. Everett considered her 1962 offer as a binding commitment to sell CTE stock to these defendants at $1,000 per share, even though the stock at the time was worth $2,500 a share. (Tr. 1736-39) So also did her attorney (now Circuit Court of Cook County Judge) Schaller, who prepared the documents in 1966 reflecting this sale. (Tr. 2199, 2205-6)

Interim Activities

Isaacs resigned as Director of Revenue on September 15, 1963 and resumed his full-time private practice of law. In early 1964, Miller urged Kerner to withdraw the late fall 1964 harness racing dates from Maywood Park, a competitor of Mrs. Everett's enterprises. Kerner's alleged involvement in the subsequent dispute over Maywood's ability to conduct this meeting successfully was said to indicate his favoritism toward Mrs. Everett's interests, and his denial before the Grand Jury of any involvement formed part of the false declaration charge in Count 14. Isaacs was not involved in this dispute which was resolved by Maywood's retaining its dates.

In late 1964, it was rumored that Maywood would attempt to obtain the late fall 1965 harness racing dates previously allotted to Egyptian Trotting Association, one of CTE's Washington Park tenants. (Tr. 5081) Again, Kerner's alleged involvement in this matter was said to indicate his favoritism, and his denial before the Grand Jury of certain conversations he was alleged to have had formed part of the false declaration charge. Isaacs' only involvement was a conversation with Mrs. Everett in which he said he would talk to a Chicago alderman who represented Maywood. (Tr. 1406-8) No suggestion that Isaacs actually discussed this matter with anyone, including Kerner, was brought forth. The matter was resolved by Maywood's being granted Egyptian's dates, and Egyptian's receiving six additional days for its rescheduled meet. (Tr. 5128-9)

In 1965 Miller proposed to Kerner and Isaacs certain amendments to pending legislation to which racing interests, including Mrs. Everett, were opposed because of their potential confiscatory tax consequences. Eventually,

under Miller's guidance, the amended legislation passed and was signed into law. (Tr. 3063-73, 5490-5102)

Knight's Purchase of CHR stock

In 1965, because of a new Illinois law, Miller found it necessary to dispose of 50,000 shares of CHR stock which had been allocated to him in 1962 after Joseph Knight's complaint that he and his friends were displeased because they had not been offered an opportunity to purchase racetrack stock as had many legislators. (Tr. 2993-4) In May, 1965, Miller and Knight arranged to deposit the shares in numbered accounts at a brokerage house because of Knight's inability to pay for all the shares at that time. Thus, 12,000 shares went into an account for Knight and 38,000 shares went into a second account. (Tr. 2408-9, 2991-2, 2995-7)

Consummation of CTE purchase

In January, 1966, Isaacs indicated to Miller that the Governor and he were irritated about the delay in receiving the CTE stock. (Tr. 3885-7) During the ensuing eight months Isaacs arranged for the purchase of two twenty-five share CTE certificates from Mrs. Everett, through Miller and Schaller, Mrs. Everett's attorney, and using Joe Knight as a nominee. (Tr. 1420-2, 3090-7, 5769-70) In payment for these shares Isaacs gave Schaller a promissory note in the amount of $50,000 at 5% interest, and two checks. The note was backdated to November 12, 1962. One check was for $50,000; the funds for this transaction had been obtained as a result of a $40,000 loan from Faith McInturf and $5,000 contributions from Kerner and Isaacs. The second check was for $8,958, representing interest on the note, although, according to Mrs. Everett, she had never discussed a loan or the payment of interest with Kerner or Isaacs. Schaller accepted the

checks, marked the note paid, returned it to Isaacs and gave the CTE certificates, worth $6,000 a share, to Miller. Thereafter, Mrs. Everett sent Isaacs a letter, prepared by Schaller, backdated to November 12, 1962, confirming the purchase of 50 shares at $1,000 per share and stating that Mrs. Everett would hold the shares as collateral for the note, which was due on or before November 15, 1966. (Tr. 1416-29, 1448-9, 2126-30, 2140-1, 3090-7)

Count 6: One-half of the interest payment tendered by Isaacs had come from Kerner. Earlier, Kerner had sent his check representing his share of the interest payment to Mrs. Everett, who returned it through Miller and Isaacs. (Tr. 1424-7) Later, after the consummation of the sale, Mrs. Everett accepted the interest check received from Isaacs and treated that amount as interest in her 1966 tax return. (Tr. 1759-62) At the end of the year Kerner mailed a copy of an IRS form 1099 to Mrs. Everett reflecting the interest payment. Count 6 was predicated on this mailing.

Kerner's and Isaacs' purchase of CHR stock

In July, 1966, Kerner and Isaacs each contributed $5,600 which was paid into Knight's account at the brokerage house for two 14,000-share certificates of CHR, for which Knight had earlier paid Miller's account. The two certificates were transferred to Knight, who held them as a nominee for Kerner and Isaacs until October, when Schaller agreed to act as nominee because of Knight's poor health.

Count 9: In February, 1967, CHR declared a dividend. Schaller, upon advice from Knight and Isaacs, wrote checks representing the dividend payment to each defendant. In March, 1967, Kerner mailed his check to the First National Bank of Chicago for deposit. Count 9 was based on this mailing.

In the spring of 1967, Miller arranged to sell Kerner's and Isaacs' CHR stock, held by Schaller, to a friend. Two $28,000 checks were made payable and delivered to Schaller. Schaller deposited them in his personal account and wrote two equivalent checks, payable to Knight, which were delivered to Issacs. (Tr. 2119-25) Isaacs delivered the checks to Knight; Knight deposited them in his account and issued a $7,000 check to Isaacs, an identical check to Kerner, and a $41,642.48 check to Mrs. McInturf as repayment for her earlier $40,000 advance.

Count 8: Kerner deposited his check in his Antioch, Illinois savings bank. That bank mailed the check, together with all others it had received during the course of the business day, to the American National Bank and Trust Company in Chicago, its depository. Count 3 had been based on this check's clearing through the St. Louis Federal Reserve Bank; Count 7 had been based on Kerner's mailing this check to his Antioch, Illinois bank. Count 8 was based on the bulk mailing from the Antioch bank to the American National Bank.

Substitution of BJC stock for CTE stock

In May, 1967 Kerner and Isaacs agreed to exchange their CTE stock for 10,000 shares of BJC stock. The BJC shares were placed in Knight's name as nominee.

Count 13: In the summer of 1967 Miller, who had gained control of CHR and BJC, submitted an application for 1968 racing dates to the IRB. The application did not reveal Isaacs' and Kerner's beneficial ownership of BJC stock. The application was accepted, and an acceptance form was mailed to Miller on November 27, 1967. Count 13 was based on this mailing.

Disposition of shares

Each defendant reported their gain from these transactions as long term capital gains on their 1967 tax returns. In addition Isaacs identified CHR as "Chicago Co." and CTE as "Bajo Co.," which was acquired on November 12, 1962. Kerner identified CHR as "Chicago Co." He reported an exchange of "C.T. Co. for Balmoral" and showed an acquisition date of November 20, 1962.

In 1968, CHR, through Miller, acquired the defendants' BJC shares for $300,000.

As the Court of Appeals observed, "* * * during the period in question no competitor of Mrs. Everett lost any racing dates. The only gain in dates was that of the additional six days for Egyptian, a tenant of her enterprises. State revenues from horse racing increased from $19.6 million in 1961 to $40 million in 1968. * * *" (App. p. 15a) Additionally, the only change in racing dates during Kerner's administration was Maywood's successful effort to obtain Egyptian's late fall 1965 racing dates.

REASONS FOR GRANTING THE WRIT

1. Misjoinder of defendants, applicability of Rule 8(b), Federal Rules of Criminal Procedure, and interpretation of Rule 8(b) in contrast to Rule 8(a).

In 1967 the Advisory Committee on the Criminal Trial of the American Bar Association's Project on Minimum Standards for Criminal Justice viewed "the joinder and severance of offenses and defendants in criminal cases, [as] a problem area of considerable dimensions in current criminal justice administration" (American Bar Association Project on Minimum Standards for Criminal Justice, "Standards relating to Joinder and Severance," p. 1 (Tentative Draft, Nov. 1967)), and noted that "the federal courts have experienced considerable difficulty in applying the language of Federal Rule 8(b) to the variety of fact situations which have arisen * * *" A.B.A. Standards, p. 14. Nothing has occurred in recent years to diminish the force of these statements.

For example, it might have been expected, since *Ingram* v. *United States*, 4th Cir. 1959, 272 F.2d 567, that all would agree Rule 8(a) of the Rule of Criminal Procedure has no application where multiple defendants are involved. E.g., *King* v. *United States*, 1st Cir. 1966, 355 F.2d 700; *Metheany* v. *United States*, 9th Cir. 1966, 365 F.2d 90; *United States* v. *Roselli*, 9th Cir. 1970, 432 F.2d 879; *Ward* v. *United States*, D.C. Cir. 1961, 289 F.2d 877; see also, *Cupo* v. *United States*, D.C.Cir. 1966, 359 F.2d 990, 992; 8 Moore's Federal Practice (Cipes ed.), ¶ 8.06, p. 8-23. It would seem to follow that joinder, where there are multiple defendants, must, as a consequence, be tested by Rule 8(b) alone. See, e.g., *United States* v. *Roselli*, *supra*, 432 F.2d at 898.

But the Court in this case relied upon a two-pronged test for determining the validity of joinder. First, in measuring Kerner's claim as to the validity of joining Counts 14 (perjury), 15 (false statements), and 17 (false return) with the remainder of the counts in which he was charged and Isaac's claim as to the validity of joining Count 19 (false return) with the remainder of the counts in which he was charged, the Court expressly employed Rule 8(a). (App. p. 49a) *United States* v. *Sweig,* 2nd Cir. 1971, 441 F.2d 114, was said to support this manner of disposition.

But *Sweig,* after the defendant Voloshen pleaded guilty before trial, was a single defendant indictment and trial. *Cf. United States* v. *Carter,* 3rd Cir. 1968, 401 F.2d 748, 749. Consequently, it was proper there to gauge the validity of joinder by Rule 8(a) standards. This the Court did, by holding that "Sweig's acts constituting the basis for the conspiracy charges and those constituting the basis for the perjury charges were * * * [based on two or more acts or transactions connected together]. Virtually every overt act alleged in the conspiracy count formed the subject matter of one of the eight perjury counts, and would therefore be admissible in a perjury trial to show the falsity of Sweig's denial before the grand jury. Given such a clear case of commonality of proof, the conspiracy and perjury offenses were surely 'connected together' for purposes of Rule 8(a)." (441 F.2d at 118-19; see also *United States* v. *Friedman,* 9 Cir. 1971, 445 F.2d 1076, 1082-3.)

But Rule 8(b) does not contain the "connected together" language of Rule 8(a). Whereas Rule 8(a) permits joinder of different offenses against a single defendant if they arise out of "two or more acts or transactions connected together"—i.e., if they are logically related—Rule 8(b) does not permit defendants to be joined for trial merely

because the counts in which they are each charged are based on "two or more acts or transactions connected together." Rule 8(b) does not even permit two defendants to be joined together if the counts in which they are charged are based on "the same act or transaction." Multiple defendants may be joined only if the acts or transactions in which they jointly participated constitute "an offense or offenses." *United States* v. *Granello,* 2 Cir. 1967, 365 F. 2d 990, 993.

By using Rule 8(a)'s "connected together" test, the Court below eliminated the more stringent requirement of Rule 8(b) that the joint actions of the defendants must constitute "an offense or offenses." Thus, under the holding of this case, multiple defendants may be jointly indicted if any one act or transaction participated in by both constitutes an offense, even though those additional counts charging one defendant alone are not part of the offense, or any offense, in which both participated.[1]

This, we submit, is the ultimate issue presented by this aspect of this case—whether Rules 8(a) and (b), with the exception of the "similar character" test in Rule 8(a), embody identical standards, or whether the standards of Rule 8(b) are more stringent. If Rule 8 in its entirety was designed to permit the prosecution a certain amount of discretion in deciding whether to indict a single defendant for multiple crimes, or multiple defendants for conduct

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[1] By limiting its proof concerning the challenged counts to the defendant named therein (e.g., Tr. 4590, 4685, 4698, 5775-6, 5057) the Government tacitly admitted that these offenses were not part of, or committed in furtherance of, the conspiracy. *Krulewitch* v. *United States,* 336 U.S. 440 (1949); *Lutwak* v. *United States,* 344 U.S. 604 (1952); *Grunewald* v. *United States,* 353 U.S. 391 (1957); cf. *Bruton* v. *United States,* 391 U.S. 123 (1968).

ultimately reflecting a single crime, subject only to the condition that the choices must be mutually exclusive of each other, the Opinion in this case eliminates much, if not all, of the mutual exclusivity between choices.

This is also reflected by the manner in which the Court resolved Kerner's claim that Count 19 (charging Isaacs) and Isaacs' claim that Counts 14, 15 and 17 were improperly joined. Here, although acknowledging that Rule 8(b) governed, the Court applied Rule 8(a) standards by neglecting to observe *Granello's* caution that the series of acts or transactions must constitute an offense or offenses. (365 F.2d at 994.) Thus joinder was deemed proper because (1) "The evidence to establish the counts in question was pertinent to proof of other counts[,]" and (2) "* * * the pertinent offenses * * * were all parts of the same series of acts or transactions, and hence subject to joinder under Rule 8(b)." (App. pp. 50a, 51a)

These issues arise repeatedly in federal criminal trials. The instant case is an excellent forum from which to announce the meaning of and essential differences between Rules 8(a) and (b).

2. Prejudice arising from joint trial with co-defendant charged with perjury, where that co-defendant is principal witness for the defense.

Isaac's claim that he was prejudiced by the joint trial of those counts charging Kerner alone with having made false statements to the Grand Jury and to IRS Agents during the investigation of this case is essentially no different than Kerner's claim that he was prejudiced by the joint trial. Nevertheless, the courts below have viewed these claims differently. The basic problem is the same, however, and certiorari should be granted to resolve the

issue, which directly relates to a basic problem of fairness in the trial of criminal cases.

In *United States* v. *Pacente,* 7th Cir. 1973, 490 F.2d 661, a panel of the Seventh Circuit consisting of Chief Judge Swygert, Circuit Judge Sprecher, and Senior District Judge Poos, sitting by designation, held that the joinder of perjury and substantive offenses imparts knowledge to the petit jury that the Grand Jury found the defendant lied in testimony before them when he denied the substantive violation, and thus "serves to impair a defendant's ability to effectively defend himself on the substantive charge." (490 F.2d at 664.) In terms particularly applicable here, the Court amplified its reasons for so holding: "In the event the defendant testifies concerning the substantive charge, the knowledge of the false declaration count has the effect of informing the petit jury that the defendant's testimony is not to be believed. Accordingly, the defendant is impeached as soon as he reaches the witness stand. On the other hand, in the event that defendant chooses not to take the stand the substantive offense is substantially reinforced by the addition of the false declaration count."[2] (490 F.2d 664.)

In *United States* v. *Gill,* 7th Cir. 1973, 490 F.2d 233, decided the same day as *Pacente,* the Seventh Circuit ruled that a defendant was not prejudiced by reason of his co-defendant's indictment for perjury under identical circum-

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[2] Petitioner Isaacs did not testify. Thus a subsidiary question presented is whether the conspiracy, Travel Act and mail fraud charges against him were reinforced by the Grand Jury's "finding" that he lied by stating in his 1966 Income Tax Return that he acquired his CTE stock on November 12, 1962, and that the sale of CTE and CHR were long term capital gains, as the Grand Jury alleged in Count 19.

stances as existed in *Pacente.*[3] Unlike the present case, both Gill and his co-defendant, Fahey, had been indicted (in separate, joined counts) for perjury, and each testified at trial in a manner supportive of the other's innocence. Rejecting each defendant's claim that he had been prejudiced by the jury's being made aware of the perjury charge against his witness-co-defendant, the Court said: "The prejudice, if any, amounted to the fact that the jurors were aware that the co-defendant was charged individually with an additional crime which was separate from the charges against the other defendant. The jurors were instructed by the judge that the evidence relating to the perjury charge against one defendant could not be used as evidence to prove any other count. Under these circumstances, we are not prepared to hold that there was an abuse of discretion in granting a severance of defendants." (490 F.2d at 239.)

Strangely, this was the identical contention advanced by the Government, and rejected by the Court, in *Pacente*: "The Government responds that this case is no different from any other one, 'since the existence of the indictment is an obvious indication that the Grand Jury felt that the defendant was guilty' and therefore there was no prejudice to Pacente in trying both counts together. While this observation may have applicability to a multicount indictment on various substantive charges, we find it to be an over simplification and inapplicable to the situation before us. It is one thing for the petit jurors to believe that the grand jury concluded that probable cause existed that

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[3] The Court also held that Gill and Fahey had each consented to and waived any error arising from the joint trial of their perjury charges and the underlying substantive offense. (490 F.2d at 238)

the defendant committed the substantive offense. It is quite another thing, however, for the petit jurors to know that the grand jurors—laymen like themselves—believed the defendant to have lied to them."[4] (490 F.2d at 664; see also, p. 665: "We are not persuaded * * * that the court's limiting instruction [not to consider evidence regarding the perjury charge as evidence on any other count of the indictment] cured the prejudice that might have resulted by trying the two counts together.")

If a "rule" may be derived from *Pacente, Gill* and this case it is this: a defendant may be prejudiced when the jury is made aware that the Grand Jury did not believe, and chose to indict for perjury on the basis of, *his* denial of having committed the underlying substantive offenses, but he is not prejudiced when the jury is made aware that *his principal witness* has been accused of lying by the Grand Jury. The fairness of such a rule, or distinction, is the issue presented for review.

There can be no question but that Kerner was a "witness" for Isaacs. The Court below found there had been sufficient evidence in this case of "the offer of a bribe, the acceptance of the offer, the corrupt intent of the offerors, the knowledge by the offerees of that intent, the receipt of valuable property by the offerees, and actions by the

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[4] In a different context, but with powerful effect in this area, the United States Attorney argued to the jury here that the Grand Jury—consisting of twenty-three citizens—had heard the evidence and the witnesses, and had voted the indictment. (Tr. 7318) It was repeatedly brought out that Kerner and Isaacs had testified before the Grand Jury, and both were accused of lying to the Grand Jury. (Tr. 7006-7, 7395) Finally, the jury were told that Kerner's perjury was the "heart of the case" and colored every other count, including those in which Isaacs was charged. (Tr. 7393-4)

offerees favorable to the offerors." (App. p. 28a) Kerner denied there had been an offer of a bribe, that any offer had been accepted, that he had any knowledge of any corrupt intent of the offerors, and that any actions had been taken favorable to the offerors as a result of their offer, or with corrupt intent.[5] Additionally, he explained the circumstances under which he and Isaacs accepted Mrs. Everett's offer of stock. More in fact than in theory, Isaacs' case depended upon the jury's believing Kerner's testimony concerning the November 9, 1962, meeting with Miller and his explanation concerning his official actions in the years following. Significantly, the perjury and false statement charges focused upon these two areas.

Had Kerner not appeared before the jury as one who was indicted for perjury for giving the same testimony, there was no conceivable manner in which the jury could have been told that the Grand Jury had heard his testimony and rejected it as wilfully false. See *e.g., Michelson* v. *United States,* 335 U.S. 469, 482 (1948); *Roberson* v. *United States,* 5th Cir. 1957, 249 F.2d 737, 742; *Pearson* v. *United States,* 6th Cir. 1951, 192 F.2d 681, 699. The Court should grant its writ to determine the basic fairness of any defendant's standing trial in a criminal case under these circumstances.

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[5] Although there were claims made during trial that Isaacs had taken favorable action for Mrs. Everett and her interests, these claims were largely illusory. Not only did Isaacs not take any action favorable to Mrs. Everett, he was not in an official position to do so. As is clear from the Opinion of the Court below, those actions which might be construed as being favorable to Mrs. Everett were official actions of the Governor (e.g., App. pp. 6a-9a)—not Isaacs.

3. Existence of scheme to defraud where only loss is the State's right to "honest and faithful" services.

In recent years the federal government has utilized the mail fraud statute as a means of extending federal criminal jurisdiction into areas of purely local misconduct and/or commercial immorality. Until recently the statute was employed only in cases where the victim had suffered a "real detriment." Now, however, the government seeks to employ the statute in such a fashion as to gain jurisdiction over what, for lack of a better term, may be characterized as "fiduciary immorality."

The history of this effort may be traced from *Shushan* v. *United States,* 5th Cir. 1941, 117 F.2d 110, where two public officials schemed with bond salesmen and others to manipulate a refunding of municipal bonds at a lower interest rate and, thereby, to realize and share fees of approximately one-half million dollars. Although the issuing public body realized a profit by way of reduced interest rates, most of this profit was eroded by the exorbitant fees which the defendants received. Noting that the "potential profit, all of it, was the property of the Board * * * [and that the] defendants had no original right to any of it" (117 F.2d at 119), the Fifth Circuit held that the defendants' activities deprived the public of this profit and amounted to a scheme to defraud within the meaning of the mail fraud statute.

When officials of the City of Alexandria, Louisiana, caused the city to purchase buses at inflated prices so they could receive kickbacks on the sales prices, the Fifth Circuit held that the receipt by these officials of funds which were generated at their principal's expense amounted to a scheme and artifice to defraud. *Bradford* v. *United States,* 5th Cir. 1942, 129 F.2d 274.

United States v. *Procter and Gamble Co.*, D.C. Mass. 1942, 47 F. Supp. 676, marked a departure from earlier cases. There, private citizens were charged with having devised a scheme to defraud by having paid employees of a competitor to steal their employer's trade secrets. Basing his decision on long-standing principles of agency law, the District Judge held that, in charging an attempt to tamper with an employer-employee relationship for the purpose of causing the employee to breach his duty to his employer by wrongfully divulging confidential information belonging to his employer, the indictment charged an offense. (7 F.Supp. at 678) In theory and in fact, the indictment charged that the defendants' conduct was designed to steal trade secrets and thus to cause their victim a "real detriment."

The *Procter and Gamble* theory was tried in *Epstein* v. *United States*, 6th Cir. 1949, 174 F.2d 754. The defendants were charged with a scheme to defraud arising from the sale of supplies to two public corporations managed by the defendants from several companies in which the defendants had an interest. There was no proof of real detriment to the alleged victims. At most, the defendants had violated their fiduciary duties by failing to reveal their dual allegiances. In overturning the defendants' convictions, the Sixth Circuit held that the defendants' failure to disclose their dual allegiances did not amount to actual fraud. "At the most, under the circumstances of this case, such failure to disclose could amount only to a constructive fraud; and that is not sufficient to sustain a charge of using the mails to defraud." (174 F.2d at 768)

A trend took a slightly different tack in 1962 when, in *United States* v. *Hoffa*, S.C. Fla. 1962, 205 F.Supp. 710, 716, the District Court ruled that the knowing use of a fiduciary position to obtain "secret profits at the expense

of" a principal was not only a breach of the fiduciary duty but an act of fraud within the meaning of the mail fraud statute. See also *Post* v. *United States,* D.C. Cir. 1968, 407 F.2d 319, 329. This theory of prohibiting profit "at the expense of a principal" was employed in *United States* v. *Faser,* E.D. La. 1969, 303 F.Supp. 380, where the indictment alleged that the defendants had schemed to defraud the State of Louisiana by using "their positions of public trust for the purpose of realizing private financial gain from the deposit of said public funds of the State * * *, thus depriving the State * * * of the honest and faithful performance of their duties as public officials * * * *" (303 F.Supp. at 381) The District Judge overruled motions to dismiss the indictment, observing:

> "There was nothing in the law to prevent the State from receiving interest, and, if the charges in this indictment are true, there can be little doubt of the fact that there was a *very real* and substantial potential profit available to the State if and when it chose to avail itself of it. * * * Thus, if he [the defendant] received and kept a profit derived from the deposit of State funds, he kept something that, under the law, belonged to the State, thus depriving the State of a *very real* potential profit." (303 F.Supp. at 384; emphasis added) See also *United States* v. *Dorfman,* S.C. N.Y. 1971, 335 F.Supp. 675.

The Court went on to note, however, that the indictment could also be sustained on the theory that the defendants had derived "secret profits" from their activities in the course of their employment by the State, and that they had denied the State their "faithful services." (303 F.Supp. at 383)

These theories were advanced by the government in *United States* v. *George,* 7th Cir. 1973, 477 F.2d 508, a

case involving payment of kickbacks in private industry. There, a manufacturer of cabinets for the Zenith Radio Corporation had paid kickbacks to Zenith's purchasing agent. Although the evidence did not show inflated prices, poor workmanship or other direct loss to Zenith as a result of these kickbacks, the government claimed that the "secret profits" received by the purchasing agent and the resulting deprivation of his "faithful services" amounted to a fraud upon Zenith.

The *George* Court withheld full approval of this theory:

> "We need not accept the government's far-ranging argument that any time an agent secretly profits from his agency he has committed criminal fraud. Not every breach of every fiduciary duty works a criminal fraud. But here Yonan's duty was to negotiate the best price possible for Zenith or at least to apprise Zenith that Greensphan was willing to sell his cabinets for substantially less money [i.e., the amount paid as a kickback]. Not only did Yonan secretly earn a profit from his agency, but also he deprived Zenith of material knowledge that Greensphan would accept less profit. There was a very real and tangible harm to Zenith in losing the discount or losing the opportunity to bargain with a most relevant fact before it." (477 F.2d at 512-3)

Thus, Judge Cummings characterized the crime as Yonan's "*actually* not giving his honest and faithful services to Zenith's *real* detriment." (477 F.2d at 413; emphasis added)

Assuming the bribe charged in this indictment, no real loss or detriment was shown as a result of the defendants' conduct. The State of Illinois did not lose the interest on

deposits that the State of Louisiana lost in *Faser*. Nor was there proof that anyone lost their right to bargain in the market place, as in *George*.[6] What was lost was a conceptual right, and it is no denigration of that right to remand redress for its loss to local bribery laws.

This case, we submit, affords the Court an opportunity—exercised frequently in recent years[7]—to establish parameters of federal criminal jurisdiction, and to particularize the reach of the mail fraud statute. Absent such particularization, the statute is literally susceptible of being read as imposing federal criminal sanctions on every breach of a fiduciary duty accompanied by the use of the mails in execution of the breach.

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[6] The instant case, despite its lack of proof that the State of Illinois, its citizens, or the racing associations doing business in the State of Illinois suffered any "real detriment," does not represent the ultimate effort by the government to use the mail fraud statute as a means of enforcing public and private morality. Pending in the United States District Court for the Northern District of Illinois and in the Court of Appeals for the Seventh Circuit are mail fraud prosecutions which charge, in essence, that money paid Chicago city aldermen as a result of their not objecting to proposed zoning changes, where no duty to object or not to object is shown, is a scheme to defraud the citizens of Chicago of the aldermens' faithful services and the monies they have received. (*E.g. United States* v. *Staszcuk*, No. 73-1869, United States Court of Appeals for the Seventh Circuit.) Pending in the United States District Court for the Northern District of Illinois (*United States* v. *Bush*, No. 74 CR 135) is a charge that a City of Chicago employee committed "mail fraud" by not disclosing to, and by concealing from, the City his interest in a company which did business with the City.

[7] E.g., *United States* v. *Bass*, 404 U.S. 336 (1971); *Rewis* v. *United States*, 401 U.S. 808 (1971).

4. Failure to instruct as to, and lack of proof of, intent to use interstate facilities.

In simplest terms, the conspiracy count charged that the defendants violated 18 U.S.C. §371 by agreeing to use facilities in interstate commerce to distribute the proceeds of bribery and to use the mails in execution of a scheme and artifice to defraud. Despite its conclusion "that the interstate activity in this case was inadequate to trigger §1952" (App. p. 30a), thus leading it to disapprove and reverse all of the remaining substantive Travel Act convictions, the Court below determined that the conspiracy count should stand because (1) "the evidence showed the requisite intent to use the mails" and (2) "Under the Travel Act the use of the interstate facilities furnishes only the jurisdictional base and need not be intentional. The pertinent intent required by the statute relates to the distribution of the proceeds of an unlawful activity. * * * Intent to provide the jurisdictional base is not essential to proof of conspiracy to commit the crime." (App. p. 40a)

In arriving at the first of these judgments, the Court considered only half of the claim made in the proceedings below. To be sure, Petitioners both claimed that the evidence was insufficient to show the requisite intent to use the mails.[8] The special panel rejected this claim, noting that it did not sit to "retry the case, weigh the evidence, or determine the credibility of witnesses. *United States* v. *Miles*, 7 Cir., 401 F.2d 65, 67. The verdict of the jury must be sustained if, taking the view most favorable to the government, substantial evidence and reasonable inferences there-

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[8] *United States* v. *Pereira*, 347 U.S. 1 (1954); *Farmer* v. *United States*, 2nd Cir. 1915, 223 Fed. 903; *Mazurosky* v. *United States*, 9th Cir. 1939, 100 F.2d 958.

from support the action of the jury. *Glasser* v. *United States*, 315 U.S. 60, 80, and *United States* v. *Zimmerman*, 7 Cir., 326 F.2d 1, 3." (App. pp. 27a-28a)

But this attitude depends upon an assumption that the jury was properly instructed, for no court can defer to the verdict of jury inadequately instructed on essential elements. See *United Brotherhood of Carpenters, etc.* v. *United States*, 330 U.S. 395, 408 (1946); *Weiler* v. *United States*, 323 U.S. 606, 611 (1944); *Nye & Nissen* v. *United States*, 336 U.S. 613, 623-4, Frankfurter, dissenting: "Our duty is not to sustain merely on the basis of a general sense that crime has been committed; our duty is to sustain only if the applicable procedural requirements have been satisfied." In this case, although requested so to do, the trial judge failed to instruct the jury that intent to use the mails was an essential element of the conspiracy charge. In the absence of a proper instruction on this critical element, judgment on the conspiracy count should not be allowed to stand on the dangerous principle, implicit in the Opinion below, that, although the jury was not properly instructed, there was sufficient evidence to warrant a finding had it been properly instructed. See *Screws* v. *United States*, 325 U.S. 91, 107 (1944).

However intriguing the issue of whether a jury verdict may be sustained on the basis of principles not explained to the jury (*cf. Pinkerton* v. *United States*, 328 U.S. 640, 645 (1945); *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1948)), the second leg of the Court's Opinion represents on extension of the federal law of conspiracy so far not undertaken by any other Circuit.

To date, *United States* v. *Roselli*, 9th Cir. 1970, 432 F.2d 879, had represented the furthest advance. *Roselli* held, as the Court below observed, that intent to use interstate facilities was not an essential element of a federal charge

of conspiracy to violate the Travel Act. Contrary to holdings or suggestions of other Circuits,[9] including the Seventh,[10] the Roselli Court held:

> "[Defendant's] argument is that conspiracy to commit a federal substantive offense necessarily includes an agreement upon all elements of that offense. We think it sufficient that the agreement contemplates the commission of a crime and that the crime contemplated is in fact and law a federal offense.
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> • • •
>
> "It may be argued that because a conspiracy to commit a substantive offense may exist without actual commission of the substantive offense, conspiracies to commit state crimes might be charged under the federal conspiracy laws if there were no need to prove agreement about the aspects of the crime that confer federal jurisdiction. The simple answer is that absent the presence of the jurisdictional element, no charge can be made. The point is not that the jurisdictional element need not exist, but merely that there need be no proof that the defendants were aware of its existence." (432 F.2d at 891-2.)

Interestingly, *Roselli's* "simple answer" to the fear that state crimes would be charged under federal conspiracy laws is neither simple nor an answer in this case. The District Court in the case of Count 5 and the Court of Appeals in the case of Counts 2, 3 and 4 determined that the jurisdictional element was absent. Petitioners now stand convicted of conspiracy to distribute the proceeds of bribery, without so much as adequate proof of the federal jurisdictional

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[9] *United States* v. *Barnes*, 6th Cir. 1967, 383 F.2d 287; cf. *United States* v. *Marquez*, 2nd Cir. 1971, 449 F.2d 89.

[10] Cf. *United States* v. *Ruthstein*, 7th Cir. 1969, 414 F.2d 1079, 1081-2; *United States* v. *Fellabaum*, 7th Cir. 1969, 408 F.2d 222, 224.

element. The "point" which *Roselli* so carefully sought to carve out—"not that the jurisdictional element need not exist, but merely that there need be no proof that the defendants were aware of its existence"—has been obliterated by the decision in this case. Even if *Roselli* correctly states the law with respect to the necessity of proving intent—a proposition we dispute—under *Roselli's* own reasoning the conspiracy charge here must fall.

On April 15, 1974, this Court granted its Writ of Certiorari in *United States* v. *Feola,* No. 73-1123 (reported *sub nom* United States v. Alsondo, 2nd Cir. 1973, 486 F.2d 1139) to review a portion of the very question presented here: "Must a prosecution for conspiracy to violate a federal law establish that the defendant knew of a jurisdictional element when such knowledge need not be shown in a prosecution for the underlying offense?" Rejecting the apparently contrary holding in *Roselli* (486 F.2d at 1343, n.9), the Second Circuit had ruled in *Alsondo* that its own prior decisions,[11] as well as those of other circuits,[12] warranted adherence to the rule that "specific knowledge of factual circumstances conferring federal jurisdiction • • • is required for proof of conspiracy • • • •" (486 F.2d at 1343) In accordance with this Court's usual practice, we ask, so far as this aspect of our case is concerned, that the Writ be granted and our case be decided on the merits in the light of the Court's decision in *Feola.*

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[11] *United States* v. *Crimmins,* 2nd Cir. 1941, 123 F.2d 271; *United States* v. *Sherman,* 2nd Cir. 1948, 171 F.2d 619, cert. denied, 337 U.S. 931 (1949); *United States* v. *Vilhotti,* 2nd Cir. 1971, 452 F.2d 1186, cert. denied, 406 U.S. 947 (1972).

[12] *United States* v. *Barnes,* 6th Cir. 1967, 383 F.2d 287, cert. denied, 389 U.S. 1040 (1968); *Nassif* v. *United States,* 8th Cir. 1966, 370 F.2d 147; cf. *United States* v. *Hall,* 4th Cir. 1965, 342 F.2d 849, 852 n.4, cert. denied, 382 U.S. 812 (1965).

CONCLUSION

For the above and foregoing reasons, as well as those applicable reasons stated by Petitioner Otto Kerner, Jr., the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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on the brief

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions, statutes, and rule involved	3
Statement	3
Argument	12
Conclusion	27

CITATIONS

Cases:	
Andrews v. *United States*, 108 F. 2d 511	19
Bradford v. *United States*, 129 F. 2d 274, certiorari denied, 317 U.S. 683	16, 17
Bryson v. *United States*, 396 U.S. 64	25
Burton v. *United States*, 202 U.S. 344	14
Chandler v. *Judicial Council*, 398 U.S. 74	14
Cohen v. *United States*, 201 F. 2d 386, certiorari denied, 345 U.S. 951	25
Davis v. *United States*, 411 U.S. 233	14
Dutton v. *Evans*, 400 U.S. 74	23
Epstein v. *United States*, 174 F. 2d 754	16
Friedman v. *United States*, 374 F. 2d 363	25
Frohwerk v. *United States*, 249 U.S. 204	19
Glidden Co. v. *Zdanok*, 370 U.S. 530	14
Gorin v. *United States*, 313 F. 2d 641, certiorari denied, 374 U.S. 829	22–23
Knowles v. *United States*, 224 F. 2d 168	25
Kolod v. *United States*, 371 F. 2d 983	23
Neely v. *United States*, 300 F. 2d 67, certiorari denied, 369 U.S. 864	25

Cases—Continued

	Page
Parr v. *United States*, 363 U.S. 370	15
Paternostro v. *United States*, 311 F. 2d 298	25
Pointer v. *Texas*, 380 U.S. 400	23
Shale v. *United States*, 388 F. 2d 616, certiorari denied, 393 U.S. 984	15
Shushan v. *United States*, 117 F. 2d 110, certiorari denied, 313 U.S. 574	16, 17
United States v. *Addonizio*, 451 F. 2d 49, certiorari denied, 405 U.S. 936	23
United States v. *Beacon Brass Co.*, 344 U.S. 43	25
United States v. *Blue*, 440 F. 2d 300, certiorari denied, 404 U.S. 836	22
United States v. *Bramblett*, 348 U.S. 503	25
United States v. *Caci*, 401 F. 2d 664, certiorari denied, 394 U.S. 917	23
United States v. *Carson*, 464 F. 2d 424, certiorari denied, 409 U.S. 949	21
United States v. *Davis*, 418 F. 2d 59	23
United States v. *Dorfman*, 335 F. Supp. 675, affirmed on other grounds, 470 F. 2d 246	16
United States v. *Echeles*, 352 F. 2d 892	22
United States v. *Edwards*, 458 F. 2d 875, certiorari denied *sub nom. Huie* v. *United States*, 409 U.S. 891	15
United States v. *Feola*, No. 73–1123, certiorari granted April 15, 1974	19
United States v. *Fellabaum*, 408 F. 2d 220	27
United States v. *Fraser*, 303 F. Supp. 380	16
United States v. *George*, 477 F. 2d 508, certiorari denied *sub nom. Yonan* v. *United States*, 414 U.S. 827	15
United States v. *Goodwin*, 455 F. 2d 710, certiorari denied, 409 U.S. 859	19
United States v. *Grizaffi*, 471 F. 2d 69, certiorari denied, 411 U.S. 964	19
United States v. *Hoffa*, 205 F. Supp. 710	16

Cases—Continued Page
United States v. *Johnson*, 426 F. 2d 1112, certiorari denied, 400 U.S. 842 22
United States v. *Kilgore*, 403 F. 2d 627, certiorari denied, 394 U.S. 932 23
United States v. *Lambert*, 470 F. 2d 354, petition for rehearing *en banc* granted April 17, 1973 24–25
United States v. *Maze*, No. 72–1168, decided January 8, 1974 17
United States v. *McCue*, 301 F. 2d 452, certiorari denied, 370 U.S. 939 25
United States v. *Mount*, 438 F. 2d 1072 26
United States v. *Pacente*, 490 F. 2d 661 ..... 21, 25–26
United States v. *Philippe*, 173 Supp. 582 25
United States v. *Polesti*, 489 F. 2d 822, petition for a writ of certiorari pending, No. 73–5489 27
United States v. *Ruthstein*, 414 F. 2d 1079 27
United States v. *Shuford*, 454 F. 2d 772 22
United States v. *Sweig*, 441 F. 2d 114, certiorari denied, 403 U.S. 932 21
Western Pacific R. Corp. v. *Western Pacific R. Co.*, 345 U.S. 247 26
Wisniewski v. *United States*, 353 U.S. 901 26
Yates v. *United States*, 354 U.S. 298 19

Constitution, statutes and rules:
U.S. Constitution:
Fifth Amendment 23
Sixth Amendment 23
U.S. Constitution, Article I, Section 3, cl. 7 12
Act of April 30, 1790, Section 21, 1 Stat. 117 13
18 U.S.C. 371 3
18 U.S.C. 1001 ..... 3, 4, 11, 24, 25
18 U.S.C. 1341 ..... 2, 3, 15

Constitution, statutes and rules—Continued
Page
18 U.S.C. 1623 4
18 U.S.C. 1952 ..... 3, 4
26 U.S.C. 7201 3
26 U.S.C. 7206(1) 4
Federal Rules of Criminal Procedure:
Rule 8(b) 20, 23, 24
Rule 12(b) 14
Rule 14 20
Miscellaneous:
Borkin, *The Corrupt Judge* (1962) 13
I. Curtis, *Constitutional History of the United States* (1889) 13
Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 Fordham L. Rev. 1 (1970) 13
3 Hinds, *Precedents of the House of Representatives* (1907) 13
Rawle, *A View of the Constitution of the United States* (2d ed., 1829) 13
Simpson, *A Treatise on Federal Impeachments* (1916) 13, 14
1 Wright, *Federal Practice and Procedure: Criminal* (1969) 20

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1650

OTTO KERNER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1651

THEODORE J. ISAACS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–64a)[1] and the order and opinion denying the petitions for rehearing (Pet. App. 65a–72a) are not yet reported. The three opinions of the district court (Pet.

[1] "Pet. App." refers to the separate appendix filed jointly by the petitioners in this Court.

App. 73a–124a) are reported at 347 F. Supp. 743, 347 F. Supp. 763, and 364 F. Supp. 895.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1974. A petition for rehearing was denied on March 28, 1974. By orders of April 3, 1974 (in No. 73–1650), and April 19, 1974 (in No. 73–1651), Mr. Justice Rehnquist extended the time for filing the petitions for writs of certiorari to and including May 6, 1974. The petition in No. 73–1650 was filed on May 4, 1974, and that in No. 73–1651 on May 6, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner Kerner, a federal court of appeals judge, was properly subjected to indictment and trial prior to his removal from office.

2. Whether the mailings proved at trial were in furtherance of a "scheme or artifice to defraud" within the meaning of 18 U.S.C. 1341.

3. Whether a conviction of conspiracy (1) to travel in interstate commerce, to use facilities in interstate commerce, and to use the United States mail with intent to distribute the proceeds of bribery and (2) knowingly and willfully to use the United States mail in furtherance of a scheme to defraud may be sustained on the facts of this case where the court of appeals reversed convictions on substantive Travel Act counts for failure to show travel or use of facilities in interstate commerce but sustained convictions on substantive mail fraud counts.

4. Whether counts of the indictment charging perjury and false statements were properly joined with counts charging conspiracy, mail fraud, and use of interstate facilities in furtherance of bribery.

5. Whether petitioners were entitled to separate trials.

6. Whether false statements made by petitioner Kerner to Internal Revenue Service agents during the course of their criminal investigation of his income tax returns violated 18 U.S.C. 1001.

7. Whether the specially appointed panel below was required to follow decisions reached by the Seventh Circuit subsequent to its appointment.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

The relevant constitutional provisions, statutes, and rule are set forth at Pet. App. 125a–131a.

STATEMENT

After a joint trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on numerous charges arising out of a scheme to accept bribes while petitioner Kerner was serving as Governor of Illinois and petitioner Isaacs was Director of the State Department of Revenue.[2] Both petitioners were convicted of conspiracy (18 U.S.C. 371), use of interstate facilities in furtherance of bribery (18 U.S.C. 1952), use of the mails in furtherance of a fraudulent scheme (18 U.S.C. 1341),

[2] Three other persons were charged in the indictment. One, Joseph Knight, was severed due to illness and died after the trial. Two others, William S. Miller and Faith McInturf, were granted immunity. With Marjorie Everett, an unindicted co-conspirator, Miller was a principal prosecution witness.

tax evasion (26 U.S.C. 7201), and filing false tax returns (26 U.S.C. 7206(1)). Kerner was also convicted of perjury before a grand jury (18 U.S.C. 1623) and of making false statements to agents of the Internal Revenue Service (18 U.S.C. 1001). Both petitioners were sentenced to concurrent terms of three years' imprisonment on each count and fined $10,000 on each of five counts. The court of appeals reversed the convictions on three counts under the Travel Act (18 U.S.C. 1952) and affirmed the convictions on the remaining counts of the indictment (Pet. App. 1a–65a).

The following summary of the events leading to this prosecution is taken from the opinion of the court of appeals (Pet. App. 3a–17a).

1. In 1960, when Kerner was the Democratic candidate for Governor of Illinois, Mrs. Marjorie Everett's racing enterprises contributed to his campaign through her associate, William Miller. Miller collected the money and gave it to Isaacs, who was Kerner's campaign manager. After his election, Kerner appointed Isaacs Director of the Department of Revenue and Miller Chairman of the Illinois Racing Board. At Isaacs' invitation, Miller submitted the names of persons whom Mrs. Everett had recommended for appointment to the Racing Board, and petitioner Kerner followed those recommendations in appointing members to the Board.

In 1961, Miller sought legislation that would permit Mrs. Everett, who already controlled two horse-racing tracks through her ownership of Chicago Thoroughbred Enterprises (CTE), to add a harness-racing corporation to her business enterprises. Such a law

was passed, and Kerner signed it. Mrs. Everett then organized Washington Park Trotting Association (WPTA) and Chicago Harness Racing, Inc. (CHR), both of which used the CTE facilities. Shares in the former were issued to nominees in favor of various legislators; CHR common shares were placed in a voting trust, and 50,000 shares were retained for distribution to persons who could help the company.

Miller and Mrs. Everett decided to make stock available to Kerner and Isaacs in order to ensure the award of favorable racing dates and other beneficial treatment. Accordingly, on November 8, 1962, Mrs. Everett wrote to Miller to confirm that she would sell 10,000 shares of WPTA common stock (at one dollar per share) and 25 shares of CTE common stock (at $1,000 per share) to Kerner and a smaller number of shares in the same companies at the same prices to Isaacs. Those prices were considerably below actual market value. On the following day Miller conveyed Mrs. Everett's offer to Kerner and Isaacs, and they accepted it. Thereafter, Isaacs repeatedly pressed Miller for delivery of the shares.

In the spring of 1964, when Kerner, in his capacity as governor, was awarding harness-racing dates, Miller advised him that Maywood Park Trotting Association, one of Mrs. Everett's competitors, was conducting its business fraudulently. Kerner contacted Thomas Bradley, then Chairman of the Harness Racing Commission, and told him that Maywood was insolvent and was being run by "wrong people." Bradley disputed these allegations, but Kerner nevertheless ordered him to cancel Maywood's autumn racing dates and reassign them to two other racing associations,

one of which was controlled by Mrs. Everett. Bradley refused to do so and held hearings at which substantial evidence supporting Maywood was submitted. Kerner, however, refused to meet with Bradley to discuss the matter and instead requested Bradley's resignation.

2. In 1964, after Kerner was re-elected, the allocation of racing dates was again in issue. Egyptian Trotting Association, which rented CTE facilities, had been tentatively assigned some desirable fall racing dates. After hearing rumors that the dates might be awarded to Maywood instead, Egyptian's director, Clyde Lee, met with Kerner to discuss the assignments. Kerner acknowledged that he personally would make the assignment, but he offered Lee no assurance of what his decision would be. Lee then discussed the matter with Mrs. Everett, who contacted James Hayes, one of the racing commissioners, and expressed her desire that Egyptian retain its fall dates. The dates were nevertheless awarded to Maywood, but Egyptian was awarded six additional racing dates.

3. In 1965, Illinois racing interests, including Mrs. Everett, were disturbed by prospective legislation that would have increased the state's revenues from thoroughbred and harness racing at the expense of the track operators. Clyde Lee met with Kerner, another state official, and Mrs. Everett's attorney. Mrs. Everett's accountants had prepared documents to show the detrimental effect of the legislation on certain harness-racing enterprises. Kerner agreed to consider the matter and, shortly thereafter, met with Issacs and Miller. They agreed to sponsor a proposal that was

more favorable to the track operators; that proposal was passed by the State legislature and signed into law by Kerner.

In August 1965, Kerner also signed a law abolishing the Harness Racing Commission and expanding the Racing Board. Miller was appointed chairman of the Board, and all but one of the new appointees were recommended to Kerner by Miller after discussions with Isaacs and Mrs. Everett.

4. In January 1966, Isaacs complained to Miller that he and "the old man" were impatient to receive the CTE stock promised by Mrs. Everett. Mrs. Everett then made 50 shares available. The purchase was facilitated by means of a $40,000 "loan" arranged by Miller. Joseph Knight, then the State Director of Financial Institutions, deposited the $40,000 check and drew another check in the same amount payable to Isaacs. Isaacs then deposited this check, together with a $5,000 check from Kerner payable to "cash," and typed "Repayment to TJI of advance payment of 25 CTE, balance owing to TJI is $20,000 plus interest at 5% from July 15, 1966" on the deposit slip.

On August 10, 1966, delivery of the shares to Isaacs was made by an attorney for Mrs. Everett's corporation. Isaacs tendered two checks drawn on his personal account and payable to Mrs. Everett—one for $50,000 and one for "interest" in the amount of $8,958. He also presented a promissory note backdated to November 12, 1962, promising to pay $50,000 at 5% interest, with the 50 shares pledged as security. Mrs. Everett's attorney cancelled the note and returned it to Isaacs and gave the CTE certificates to Miller. The

shares were worth $300,000 at the time of this transaction.

At the request of Miller and Isaacs, Mrs. Everett sent Isaacs a letter backdated to November 12, 1962, confirming the purchase of 50 shares of CTE at $1,000 per share and stating that she would hold the shares as collateral for Isaacs' $50,000 note, due on or before November 15, 1966, with interest at 5%. The "interest" paid by Isaacs at the August 10 meeting was not, in fact, due and was intended merely to corroborate the authenticity of the backdated note. In 1967, Kerner sent an IRS Form 1099 by mail to Mrs. Everett, reporting his share of the "interest" payment. (This mailing constituted the basis for the mail fraud charged in Count VI of the indictment.)

In the meantime, Knight deposited $11,200 (for which he was later reimbursed by Kerner and Isaacs) in Miller's account at the brokerage house of Sincere & Co. as payment for the 28,000 shares of CHR which had been allocated to Kerner and Isaacs. Two 14,000-share certificates were transferred to Knight's name. Mrs. Everett's attorney, George Schaller, subsequently agreed to act as nominee on behalf of the beneficial owners.

In the autumn of 1966, when CHR and CTE applied for their 1967 racing dates, the application listed Mrs. Everett as the owner of 2,000 shares of CTE and Schaller as the owner of 38,000 shares of CHR. The applications thus violated a regulation which required disclosure of dummy holdings and identification of the beneficial owners, since Kerner and Isaacs were each the beneficial owners of 25 of the CTE shares reported

by Mrs. Everett and 14,000 of the CHR shares reported by Schaller.

In early 1967, CHR declared a 20 cent per share dividend. Knight requested that Schaller pay the dividends "to the true owners [of the stock], whose identity I have disclosed to you orally." At Isaacs' request, Schaller then deposited the dividend checks in his account and wrote two personal checks, each in the amount of $2,800, payable to Kerner and Isaacs, respectively. (The mailing of the personal checks constituted the basis for the mail fraud charged in Count IX.)

In April 1967, Miller arranged for the purchase of the 28,000 CHR shares held by Kerner and Isaacs. Isaacs consented to the sale, and the purchaser drafted two checks payable to Schaller, each in the amount of $28,000. Schaller deposited these checks and wrote two others in the same amounts, payable to Knight. Isaacs delivered those checks to Knight, who deposited them in his account. Knight then wrote two checks, each for $7,000, payable to Kerner and Isaacs, respectively, and a check for $41,642.48 to repay the $40,000 "loan" which had been used in the purchase of the CTE stock. Knight then mailed one of the $7,000 checks to Kerner. (The mailing of Knight's check to Kerner formed the basis for the mail fraud charged in Count VIII.)

In May 1967, Isaacs and Kerner exchanged their CTE shares for 10,000 Balmoral Jockey Club (BJC) shares held by Mrs. Everett, so that she could return the CTE shares to the bank that had been holding them as collateral. The exchange was effected by

transferring the BJC shares to Knight, who acted as nominee. In June 1967, Miller acquired control of BJC. The application he filed on behalf of BJC for 1968 racing dates failed to disclose the beneficial interests of Kerner and Isaacs. The requested racing dates were granted, and a letter and form confirming that fact was mailed by the Board to BJC. (This mailing constituted the basis of the mail fraud charged in Count XIII.)

Subsequently, Miller bought the BJC shares owned by Kerner and Isaacs. To effect the purchase, Miller drafted a check for $300,000, payable to Knight. Knight endorsed the check in blank and delivered it to Isaacs. Isaacs arranged for a bank for which he performed legal services to negotiate the check without further endorsement (contrary to normal bank procedures). Isaacs opened a checking account for Kerner and savings accounts for himself and Kerner and deposited $15,000 in each savings account, $135,000 in Kerner's checking account and $135,000 in his own checking account. The net result of these transactions was the payment to Kerner and Isaacs of nearly $160,000 in return for payments by them of only $15,079 each.

5. On his 1967 federal income tax return, Isaacs reported the purchase of 14,000 shares of "Chicago Co." in 1966 for $5,600 and their sale a year later for $28,000. He also reported a 1967 sale for $150,000 of 25 shares of "Bajo Co." acquired in 1962 for $25,000. In his 1967 return, Kerner reported a "Chicago Co." transaction identical to that listed in Isaacs' return and a sale for $150,000 of 5,000 shares of "Balmoral,"

acquired in exchange for 25 shares of "C.T. Co." stock purchased for $25,000 in 1962. These "sales" were treated by both Kerner and Isaacs as giving rise to long-term capital gains. The government charged, however, and the jury found, that these items actually referred to the CTE and CHR stock that had been received as bribes in 1966 and were taxable as ordinary income for that earlier year. (Counts XVI and XVIII of the indictment charged Kerner and Isaacs, respectively, with income tax evasion. Counts XVII and XIX charged the making of false statements on the tax returns.)

In July 1970, two IRS special agents visited Kerner, who by that time was a judge of the United States Court of Appeals for the Seventh Circuit. After being advised of his rights, Kerner was asked to identify the "Chicago Co." listed on his 1967 return. Kerner denied that the item referred to CHR and instead falsely claimed that "Chicago Co." refered to a financial institution, that a named friend was an officer of that corporation, and that the stock had been purchased on a broker's recommendation. (These statements were the basis for Count XV, charging Kerner with making false statements in violation of 18 U.S.C. 1001.)

In 1971, Kerner requested an appearance before a federal grand jury investigating Illinois racing operations. During his testimony he denied that he had ordered Bradley to reassign Maywood's 1964 racing dates or that he had discussed the Egyptian Trotting Association racing dates with Clyde Lee. (Count XIV,

charging Kerner with perjury, was based upon those denials.)

6. Both Kerner and Isaacs presented evidence at trial, and Kerner testified in his own behalf. Isaacs did not take the stand.

ARGUMENT

1. Petitioner Kerner contends (Kerner Pet. 6-9) that his conviction effectively deprived him of his judicial power and therefore operated to remove him from the office of federal judge in a manner not authorized by the Constitution. He argues that he is not subject to criminal prosecution until he has been impeached by the House of Representatives and convicted by the Senate. This argument fails for two independent reasons.

a. First, there is no constitutional bar to the criminal prosecution of a federal judge. Although Article I, Section 6 of the Constitution grants members of Congress an express, if limited, immunity from arrest, the Constitution contains no similar grant of immunity, either from arrest or prosecution, for judges. Petitioner perforce relies on the final clause of Article I, Section 3, Clause 7, which provides that "the Party convicted [on impeachment] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." But the sole purpose of that caveat is to ensure that the Double Jeopardy Clause may not be invoked as a bar to criminal proceedings following removal from office by impeachment; it was not intended to, and does not by its terms, confer upon judges any immunity from prosecution prior to impeachment.

Historical practice and commentary support this view. The first Congress, many of whose members had been delegates to the Constitutional Convention, enacted Section 21 of the Act of April 30, 1790, 1 Stat. 117, recognizing that sitting federal judges were criminally punishable for bribery and providing for their disqualification from office upon conviction. In 1796 Attorney General Lee informed Congress that a judge of a territorial court, a civil officer subject to impeachment, was indictable for criminal offenses while in office. 3 Hinds, *Precedents of the House of Representatives* 982–983 (1907). In this century, two sitting federal judges (other than petitioner) have been indicted and tried while in office. See Borkin, *The Corrupt Judge* 95–186 (1962). And constitutional scholars have long agreed, with virtual unanimity, that "the ordinary tribunals * * * are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency." Rawle, *A View of the Constitution of the United States,* 215 (2d ed., 1829). See, *e.g.,* 1 Curtis, *Constitutional History of the United States* 481–482 (1889); Simpson, *A Treatise on Federal Impeachments* 52–53 (1916); Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions,* 39 Fordham L. Rev. 1, 55 (1970).

Moreover, there is no merit to petitioner's suggestion that conviction of a crime is constitutionally equivalent to removal from office. As this Court noted in connection with the criminal prosecution of a Senator, "the final judgment of conviction [does] not operate, *ipso facto,* to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him

as expelled by force alone of the judgment." *Burton* v. *United States*, 202 U.S. 344, 369. Whether the criminal conviction of a federal judge will lead to his removal by impeachment rests upon the sound judgment and discretion of the Congress. See Simpson, *supra*, at 52. Thus even those who insist most ardently that impeachment is the sole constitutional method of removing a federal judge from office nevertheless agree that "judges, like other people, can be tried, convicted, and punished for crimes * * *." *Chandler* v. *Judicial Council*, 398 U.S. 74, 141–142 (dissenting opinion of Mr. Justice Black).

b. Second, since petitioner Kerner failed to raise his office as a defense at trial, he is precluded from doing so on appeal. Fed. R. Crim. P. 12(b)(2). Cf. *Davis* v. *United States*, 411 U.S. 233. The court of appeals (by a vote of 2 to 1) resolved this question of waiver in petitioner's favor (Pet. App. 18a–20, 63a). The court of appeals, relying upon *Glidden Co.* v. *Zdanok*, 370 U.S. 530, apparently reasoned that a nonfrivolous constitutional claim relating to the power of the court to act necessarily concerns subject-matter jurisdiction. But this Court's holding in *Zdanok*—that the question whether an appellate court was properly constituted may be raised for the first time upon review of that court's decision—has no application here. Petitioner's claim has nothing to do with the trial court's general power to act; nor does it challenge the court's general subject-matter jurisdiction over federal crimes. Petitioner's claim is merely one of a personal immunity and that is a matter of personal jurisdiction that is waived if not raised at trial, as it was not here.

2. Petitioners contend (Kerner Pet. 9–12; Isaacs Pet. 29–33) that the bribery scheme here did not amount to a "scheme or artifice to defraud" within the meaning of the mail fraud statute, 18 U.S.C. 1341, and (Kerner Pet. 16–17) that the mailings here were not in any event in furtherance of that scheme.

a. Petitioners' statutory claim is that the mail fraud statute does not reach bribery schemes that defraud a State and its citizens of the honest services of their public officials. Petitioners complain that federal punishment of state officials for bribery is an unwarranted intrusion by the federal government into state affairs. But "Congress may forbid any mailing in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme itself or not." *United States* v. *Edwards*, 458 F. 2d 875, 880 (C.A. 5), certiorari denied *sub nom. Huie* v. *United States*, 409 U.S. 891. And since the purpose of the statute was to ensure the integrity of the national postal system by denying its facilities for use in any fraudulent plan (*Parr* v. *United States*, 363 U.S. 370, 389), mailings in furtherance of state bribery schemes are within its intended prohibition.

Petitioners argue that the statutory language, "scheme or artifice to defraud," covers only schemes involving tangible loss to victims. But it is well understood that no proof of tangible loss is required for conviction. *Shale* v. *United States*, 388 F. 2d 616, 618 (C.A. 5), certiorari denied, 393 U.S. 984; *United States* v. *George*, 477 F. 2d 508, 512 (C.A. 7), certiorari denied *sub nom. Yonan* v. *United States*, 414 U.S. 827. "Using a fiduciary position to obtain secret

profits is not only a breach of trust but an active fraud, and such conduct is condemned by the mail fraud statute if the mail is used in furtherance of the execution of said scheme." *United States* v. *Hoffa*, 205 F. Supp. 710, 716 (S.D. Fla.). See also, *Bradford* v. *United States*, 129 F. 2d 274, 276 (C.A. 5), certiorari denied, 317 U.S. 683; *United States* v. *Dorfman*, 335 F. Supp. 675 (S.D. N.Y.), affirmed on other grounds, 470 F. 2d 246 (C.A. 2); *United States* v. *Faser*, 303 F. Supp. 380 (E.D. La.).[3] In particular, it has long been understood that a scheme contemplating bribery of a public official is a scheme to defraud. *Shushan* v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574. There was, in any event, tangible loss here. The citizens of Illinois were deprived not only of the honest service of their public officials but also of the additional state revenues that would have been received if legislation favoring track operators had not been enacted; and the innocent racing associations in the State were deprived of the additional

[3] Nothing in *Epstein* v. *United States*, 174 F. 2d 754 (C.A. 6), on which petitioners rely, is to the contrary. The indictment there charged a scheme by corporate officers to sell supplies to their corporation at inflated prices, and the convictions were reversed because the government's proof showed that the prices were in fact at or below market. The court of appeals refused to sustain the conviction on a "breach of trust" theory that had not been presented by the prosecution at trial; moreover, it believed that a breach of trust would not amount to active fraud where the self-dealing violated no law or corporate charter. That decision obviously does not support petitioners here, who were tried on a theory of breach of trust with respect to acts that were criminal offenses under state law.

profits that might have accrued from an impartial assignment of racing dates.[4]

b. Petitioner Kerner relies upon *United States* v. *Maze*, No. 72–1168, decided January 8, 1974, in asserting that the mailings here were not in furtherance of the bribery scheme. But the relationship of the mailings to the effectuation of the scheme is far closer than in *Maze*. This Court summarized the critical facts in *Maze* as follows (slip. op. at p. 7):

> Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims utlimately [*sic*] bore the loss. Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all.

In contrast, the mailings here were critical to the success of the scheme, which depended for its full effectuation on concealment of petitioners' beneficial ownership of the stock that had been conveyed as a bribe and on conversion of those stock interests into cash in a clandestine manner. Petitioner Kerner's mailing of the IRS Form 1099 to Mrs. Everett purporting to show the payment of accrued interest (Count VI)

[4] It is irrelevant that petitioners were not solely responsible for the enactment of the legislation or the assignment of racing dates. "The fact that the official who is bribed is only one of several and could not award the contract by himself does not change the character of the scheme where he is expected to have influence enough to secure the end in view." *Shushan* v. *United States*, *supra*, 117 F. 2d at 115. See also *Bradford* v. *United States*, *supra*, 129 F. 2d at 276.

was part of a continuing scheme to conceal the fact that the stock had been received as a bribe rather than by purchase; Schaller's deposit of the dividend checks into his account and his mailing of personal checks to petitioners (Count IX) accomplished the transfer of cash to petitioners in a manner that would conceal their ownership interests in the racing enterprises; similarly, Knight's deposit of another of Schaller's checks into his own account and his subsequent mailing of substituted personal checks to petitioners (Count VIII) also resulted in their being paid off in secret; finally, the mailing of confirmation of racing dates to BJC on the basis of its false application (Count XIII) was a necessary link in the chain of events that permitted Mrs. Everett's company to profit from the bribery without disclosing petitioners' illegally obtained interests.

3. Count I of the indictment alleged a conspiracy "a. to travel in interstate commerce, to use facilities in interstate commerce, * * * and to use the United States mail, with intent to distribute the proceeds of bribery * * *; and b. to knowingly and wilfully use the United States mails and to cause the United States mails to be used in furtherance of a scheme to defraud" (J. App. 5a).[5] Petitioners contend here (Kerner Pet. 12–16; Isaacs Pet. 34–37) that, since the court of appeals reversed their substantive convictions under the Travel Act, they cannot logically be held guilty of

[5] "J. App." refers to the Joint Appendix in the court of appeals.

the conspiracy so alleged.[6] This contention is without merit.

It is settled that a single count of an indictment may allege a conspiracy to violate two or more statutes (*Frohwerk* v. *United States*, 249 U.S. 204) and that proof of any one of the alleged illegal objects of the conspiracy will support a conviction for the conspiracy. *United States* v. *Grizaffi*, 471 F. 2d 69 (C.A. 7), certiorari denied, 411 U.S. 964; *United States* v. *Goodwin*, 455 F. 2d 710, 713–714 (C.A. 10), certiorari denied, 409 U.S. 859; *Andrews* v. *United States*, 108 F. 2d 511, 515 (C.A. 4). In this case, Count I charged a conspiracy to violate both the Travel Act and the mail fraud statute, and the government presented ample evidence to show that petitioners devised a scheme to defraud the State of Illinois, its citizens, and its racing associations, and that the mails were knowingly caused to be used in furtherance of the scheme. And since the jury convicted petitioners of the substantive offense of mail fraud, this is not a case where the reviewing court has "no way of knowing" (*Yates* v. *United States*, 354 U.S. 298, 311) whether the jury found sufficient overt acts to support a proper conviction for conspiracy.[7] Thus petitioners' convictions

[6] In making this argument, petitioners attempt to raise the issue currently before the Court in *United States* v. *Feola*, No. 73-1123, certiorari granted April 15, 1974, *i.e.*, whether the conspirators' knowledge of the federal jurisdictional element must be separately proven in a federal conspiracy prosecution.

[7] Moreover, the jury was instructed that to find a conspiracy to use the mails in furtherance of a scheme to defraud it must find, *inter alia*, that use of the mails was either contemplated by the conspirators or reasonably foreseeable (Tr. 7457–7461). Thus the issue presented by *United States* v. *Feola*, *supra*, does not arise at all in this case.

for conspiracy are sustainable notwithstanding the reversal of their convictions on the substantive Travel Act counts.

4. Petitioner Kerner contends (Kerner Pet. 18–20) that he was prejudiced by the joinder of the count charging him with perjury before the grand jury with the other counts of the indictment. As petitioner Isaacs points out (Isaacs Pet. 21–24), the accepted test for joinder of offenses in multiple defendant trials is provided by Rule 8(b), Fed. R. Crim. P., which permits joinder of offenses committed in the same series of acts or transactions. See 1 Wright, *Federal Practice and Procedure: Criminal* 313, 318–319 (1969). Joinder of the perjury charge with the other charges was proper under that test. As the court of appeals stated (Pet. App. 50a):

> The perjury and other offenses with which we are concerned have a logical relationship. They are all connected with, or arose out of, a common plan to corruptly influence the regulation of horse racing. The perjury charge against Kerner related to his involvement with the racing industry, and evidence of that involvement was pertinent to the proof of the other offenses.

In short, the perjury and the other charged offenses arose from a common "series of acts or transactions" involving a scheme by public officials to perform favors for Mrs. Everett's racing interests in return for illegal bribes, and therefore were properly joined under Rule 8(b).

The district court properly denied petitioner Kerner's motion under Rule 14, Fed. R. Crim. P., for

separate trial of the perjury count. Proof of the perjury count required substantially the same evidence as was required to establish petitioner Kerner's guilt on the conspiracy and mail fraud counts, and separate trials would therefore have involved substantial duplication in the presentation of witnesses and evidence. Moreover, petitioner Kerner suffered no cognizable prejudice from joinder of the perjury count, since evidence of the perjury would in any event have been admissible at a separate trial of the conspiracy and mail fraud counts as a false exculpatory statement tending to show consciousness of guilt. See *United States* v. *Carson*, 464 F. 2d 424, 436 (C.A. 2), certiorari denied, 409 U.S. 949; *United States* v. *Sweig*, 441 F. 2d 114, 118–119 (C.A. 2), certiorari denied, 403 U.S. 932.

Petitioner Kerner relies on *United States* v. *Pacente*, 490 F. 2d 661 (C.A. 7), petition for rehearing *en banc* granted February 19, 1974. In that case, another panel of the Seventh Circuit held that a count charging perjury before the grand jury should not be joined with other counts because the perjury charge impeaches the defendant before the petit jury. But the perjury charge here was little different in that respect from the other charges against petitioners, all of which involved some form of deceitful, dishonest conduct. *Pacente* involved joinder of a perjury charge with non-deceitful conduct—interference with commerce by threats or violence—and therefore is distinguishable. But we further agree with the court of appeals below that "the holding in [*Pacente*] is bad law," for it would lead to repetitive trials involving duplicative

witnesses and evidence, and would thereby impose a severe strain on judicial, prosecutorial, and defense resources.

5. Both petitioners contend that they were entitled to separate trials.

a. Petitioner Kerner claims (Kerner Pet. 20–23) that he was prejudiced by denial of a severance. That claim rests upon the unsupported assumption that Isaacs, who refused to testify at their joint trial, would have furnished exculpatory testimony at a separate trial of Kerner alone. But Isaacs never indicated that he possessed evidence that would exculpate Kerner, nor did he ever intimate that he would be willing to waive his Fifth Amendment privilege in order to testify in a separate trial of Kerner. A defendant is not entitled to a severance on the bare possibility that a co-defendant's testimony will be available to him if and only if they are separately tried. *United States* v. *Johnson*, 426 F. 2d 1112, 1116 (C.A. 7), certiorari denied, 400 U.S. 842.[8] In short, petitioner Kerner's claim here is based on nothing more than mere speculation that a severance might have aided his defense. Such speculation is insufficient to show an abuse of the trial judge's discretion in refusing severance. *United States* v. *Blue*, 440 F. 2d 300, 302 (C.A. 7), certiorari denied, 404 U.S. 836; *Gorin* v. *United*

[8] Petitioner Kerner relies on *United States* v. *Shuford*, 454 F. 2d 772 (C.A. 4), and *United States* v. *Echeles*, 352 F. 2d 892 (C.A. 7). But in those cases the co-defendants had represented to the court, at the time of the motion for severance, that they would be willing to testify in favor of the defendant seeking severance if he were tried separately. There was no such representation here.

States, 313 F. 2d 641, 645–646 (C.A. 1), certiorari denied, 374 U.S. 829; *United States* v. *Caci*, 401 F. 2d 664 (C.A. 2), certiorari denied, 394 U.S. 917; *United States* v. *Kilgore*, 403 F. 2d 627 (C.A. 4), certiorari denied, 394 U.S. 932; *Kolod* v. *United States*, 371 F. 2d 983, 990–992 (C.A. 10). This is particularly so where, as here, severance would have required duplication of a lengthy and complex trial. *United States* v. *Davis*, 418 F. 2d 59, 61 (C.A. 9).[9]

b. Petitioner Isaacs claims (Isaacs Pet. 21–28) that his defense was prejudiced by the perjury and false statement charges against Kerner and that he should have been granted severance on that account. We have shown above (pp. 20–22, *supra*) that joinder of the perjury charge with Kerner's other offenses was proper under Rule 8(b), Fed. R. Crim. P.[10] Joinder of Kerner and Isaacs as defendants was also proper under that Rule. The indictment alleged petitioners' joint participation in an illegal conspiracy and in vio-

[9] Petitioner Kerner also contends that the co-conspirator exception to the hearsay rule offends the Sixth Amendment's Confrontation Clause where the co-conspirator declarant refuses to testify. But Kerner's premise—that hearsay is invariably inadmissible where the declarant is unavailable for confrontation—has consistently been rejected by this Court. See *Pointer* v. *Texas*, 380 U.S. 400, 406–407. And in *Dutton* v. *Evans*, 400 U.S. 74, the Court upheld a broader Georgia co-conspirator exception under circumstances in which it was reasonably clear that the co-conspirator declarant would have asserted his Fifth Amendment privilege had he been called to testify. See also *United States* v. *Addonizio*, 451 F. 2d 49, 71 (C.A. 3), certiorari denied, 405 U.S. 936.

[10] Joinder of the false statement charges was also proper for the same reasons. Petitioner Kerner does not here object to the joinder of the latter charges.

lations of the Travel Act and the mail fraud statute; these allegations amply satisfied Rule 8(b)'s requirement that co-defendants be "alleged to have participated * * * in the same series of acts or transactions constituting an offense or offenses."

Petitioner Isaacs nevertheless argues that he was entitled to a severance because Kerner, who testified for the defense at trial, was implicitly impeached by the jury's awareness of the perjury charge. This argument is substantially identical to petitioner Kerner's argument for a separate trial of the perjury charge (see pp. 20–22, *supra*), and it fails for similar reasons. Petitioner Isaacs' claim of prejudice from the joinder is vague and insubstantial; it does not amount to a showing of an abuse of discretion by the trial judge, especially in view of the lengthy and extensive duplication of witnesses and evidence that separate trials would have required.

6. Petitioner Kerner contends (Kerner Pet. 23–24) that the false statements that he made to Internal Revenue Service agents during the course of their investigation of his federal income tax returns did not violate 18 U.S.C. 1001, because those statements were unsworn oral responses to questions asked by government "investigators." It is true that some courts have held that false statements made to Federal Bureau of Investigation agents are not within the purview of that statutory offense, on the ground that since that agency has no power to regulate, compel action, or dispose of claims, it has no "jurisdiction" within the meaning of the statute. See, *e.g., United States* v. *Lambert,* 470 F. 2d 354 (C.A. 5), petition for rehear-

ing *en banc* granted April 17, 1973; *Friedman* v. *United States*, 374 F. 2d 363, 368–369 (C.A. 8).[11] But it has long been understood that the Internal Revenue Service has the necessary "jurisdiction" under the statute and that false statements given to internal revenue agents pertaining to matters within that jurisdiction—such as an investigation into the correctness of federal income tax returns—are proscribed by 18 U.S.C. 1001. *United States* v. *McCue*, 301 F. 2d 452, 455 (C.A. 2) certiorari denied, 370 U.S. 939; *Knowles* v. *United States*, 224 F. 2d 168, 172 (C.A. 10); *Cohen* v. *United States*, 201 F. 2d 386, 392 (C.A. 9), certiorari denied, 345 U.S. 951.[12]

The fact that petitioner's false statements were oral and unsworn does not affect his liability under the statute. *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46; *Neely* v. *United States*, 300 F. 2d 67, 69–71 (C.A. 9), certiorari denied, 369 U.S. 864. See also *United States* v. *Bramblett*, 348 U.S. 503, 508.

7. Petitioner Kerner claims (Kerner Pet. 25–27) that the specially appointed panel below exceeded its power in failing to follow the decision of a regular Seventh Circuit panel in *United States* v. *Pacente*,

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[11] The question of the validity of such decisions with respect to the FBI was left open by this Court in *Bryson* v. *United States*, 396 U.S. 64, 71, n. 10.

[12] *Paternostro* v. *United States*, 311 F. 2d 298 (C.A. 5), and *United States* v. *Philippe*, 173 F. Supp. 582 (S.D. N.Y.), on which petitioner relies, involved the different question whether an "exculpatory no" is a "statement" within the meaning of the statute. That issue is not raised by petitioner's affirmative false statements in explanation of an item on his income tax return.

supra. This contention is erroneous for several independent reasons.

First, there is no basis for petitioner's allegation that the panel below refused to follow *Pacente*. The panel expressly distinguished *Pacente* on its facts by pointing out (Pet. App. 51a–52a) the voluntary nature of Kerner's, but not Pacente's, appearance before the grand jury and the fact that perjury was merely one of nineteen charges here, whereas in *Pacente* the indictment contained only two counts. Moreover, the perjury count here was merely one of several counts alleging deceitful conduct, whereas it was the only such count in *Pacente*.

Second, even assuming the decision below conflicts with *Pacente*, one panel of a court of appeals has no obligation to follow the decision of another panel within the same circuit. See *United States* v. *Mount*, 438 F. 2d 1072, 1073–1074 (C.A. 9). And while a rehearing *en banc* is an appropriate means for resolution of an intra-circuit conflict, a litigant is not entitled to such a rehearing as a matter of right. *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247. Thus the special circumstances of this case, which preclude *en banc* consideration, do not warrant resolution by this Court of a purely intra-circuit conflict, especially since any such conflict apparently will be resolved by the Seventh Circuit in its *en banc* consideration of *Pacente*. See *Wisniewski* v. *United States*, 353 U.S. 901.

Third, it would have been inappropriate for the panel below to have applied the usual doctrine of *stare decisis* to any Seventh Circuit decision, such as *Pa-*

cente, decided after its appointment. The active judges of the Seventh Circuit presumably recused themselves here with the intention of avoiding even the appearance of sitting in judgment over one of their colleagues or of influencing the decision in his case in any way. They therefore could not have intended their decisions in other cases, rendered while petitioner Kerner's appeal was pending, to have bound the special panel that was hearing that appeal. For that reason, the panel was clearly correct in refusing to defer its decision until after *Pacente* was decided *en banc*.[13]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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MAY 1974.

[13]Petitioner Kerner also contends that the panel below refused to follow *United States* v. *Fellabaum*, 408 F. 2d 220 (C.A. 7), and *United States* v. *Ruthstein*, 414 F. 2d 1079 (C.A. 7), which he characterizes as holding that intent to commit acts supplying the jurisdictional element must be proven to establish a conspiracy to violate the Travel Act. In so contending, petitioner simply misstates the law of the circuit. The Seventh Circuit "has consistently affirmed conspiracy convictions where knowledge of the interstate element was not part of the trial court's conspiracy instructions." *United States* v. *Polesti*, 489 F. 2d 822, 824 (C.A. 7), petition for a writ of certiorari pending, No. 73-5489.

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No. 73-1651

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

THEODORE J. ISAACS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

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INDEX

PAGE

1. Misjoinder of defendants, applicability of Rule 8(b), Federal Rules of Criminal Procedure, and interpretation of Rule 8(b) in contrast to Rule 8(a) 1

2. Prejudice arising from joint trial with co-defendant charged with perjury, where that co-defendant is principal witness for the defense 3

3. Existence of scheme to defraud where only loss is the State's right to "honest and faithful" services 4

4. Failure to instruct as to, and lack of proof of, intent to use interstate facilities 5

Conclusion 7

AUTHORITIES CITED

Cases

Grunewald v. United States, 353 U.S. 391 (1957) 2

King v. United States, 1st Cir. 1966, 355 F.2d 700 3

Krulewitch v. United States, 336 U.S. 440 (1949) 2

Lutwak v. United States, 344 U.S. 604 (1952) 2

Metheany v. United States, 9th Cir. 1966, 365 F.2d 90 .. 3

Shushan v. United States, 5 Cir. 1941, 117 F.2d 110 4

Street v. New York, 394 U.S. 576 (1969) 5

United States v. Bova, 5th Cir. 1974, 493 F.2d 33 3

PAGE

United States v. Faser, E.D.L.A. 1969, 303 F.Supp. 380 4

United States v. Feola, No. 73-1123, certiorari granted April 15, 1974 6

United States v. Granello, 2nd Cir. 1967, 365 F.2d 900 2-3

Vitello v. United States, 9 Cir. 1970, 425 F.2d 416 5

Ward v. United States, D.C. Cir. 1961, 289 F.2d 877 .. 3

Yates v. United States, 354 U.S. 298 (1957) 5

Other Authorities

Rule 8(a), F.R.Cr.P. 1, 2

Rule 8(b), F.R.Cr.P. 1, 2, 3

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REPLY BRIEF FOR PETITIONER ISAACS

This reply to the Government's Brief in Opposition follows the order and headings set forth in our Petition. The paragraph number of that portion of the Government's Brief corresponding to each of Petitioner's points appears alongside each heading.

1. Misjoinder of defendants, applicability of Rule 8(b), Federal Rules of Criminal Procedure, and interpretation of Rule 8(b) in contrast to Rule 8(a). (G.Br. ¶ 4)

The Government contends that joinder of the perjury and false statement counts was proper because each "arose from a common 'series of acts or transactions' involving a scheme by public officials to perform favors for

Mrs. Everett's racing interests in return for illegal bribes • • • •"[1] (G.Br. 20) This is in direct contrast to the position taken by the Government at trial and on appeal.

At each stage of the proceedings below the Government expressly conceded that statements made by Kerner to the Grand Jury, to investigating Internal Revenue Service Agents and in his tax returns were not admissible against Isaacs (e.g., Tr. 4590, 4685, 5057; see also, 4602-6, 4698, 4775-6), thus impliedly conceding that these statements were not part of the transaction described by the Travel Act, Mail Fraud and conspiracy counts. *Krulewitch* v. *United States,* 336 U.S. 440 (1949); *Lutwak* v. *United States,* 344 U.S. 604 (1952); *Grunewald* v. *United States,* 353 U.S. 391 (1957).

The flaw in the Government's reasoning is that it regards joinder of offenses as proper, if those offenses are committed as part of the same series of acts or transactions. But, as we have pointed out in our Petition (I. Pet. 23-4), this is Rule 8(a) language. Rule 8(b) permits joinder only if the series of acts or transactions constitute an offense.[2] *United States* v. *Granello,* 2nd Cir. 1967, 365 F.2d

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[1] The Government's Statement of the case, although accurately reciting that the offer of racetrack stock was made to Kerner and Isaacs while the former was Governor and the latter was Director of the Department of Revenue (G.Br. 3), inaccurately makes it appear as though the Department of Revenue, or Isaacs, had some control over racing. Such was not the case. Moreover, Isaacs resigned as Director on September 15, 1963, long before the stock was delivered. (Tr. 6792) No part of this case touched upon the Department of Revenue or Isaacs' conduct of the affairs of that Department.

[2] By inadvertence counsel for Petitioners neglected to print Rule 8 of the Federal Rules of Criminal Procedure (18 U.S.C.A.) in their Joint Appendix. The Rule is printed *infra,* Appendix A.

990, 993. Thus, the Government's acknowledgement that the perjury and false statements were not part of the so-called bribery scheme bears heavily on its claim that counts charging these offenses could be joined with the counts charging the bribery.

2. Prejudice arising from joint trial with co-defendant charged with perjury, where that co-defendant is principal witness for the defense. (G.Br. 5 b)

By failing to recognize the essential difference between a claim of misjoinder under Rule 8(b) and a claim of prejudice warranting relief under Rule 14, the Government attempts to obscure Isaacs' claim with respect to his being tried under circumstances where the jury is advised that his principal defense witness has been charged with perjury for giving essentially the same testimony before a grand jury.[3] This question presupposes proper Rule 8(b) joinder. It asks whether Isaacs was entitled to relief under Rule 14 because the trial jury was advised that the

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[3] Even under this Point the Government seems to claim that joinder of the counts charging perjury and false statements was proper merely because Kerner and Isaacs were properly joined in the Travel Act, Mail Fraud and conspiracy counts. (G.Br. 23-4) This, clearly, is not the permission given by Rule 8(b). King v. United States, 1st Cir. 1966, 355 F.2d 700; Metheany v. United States, 9th Cir. 1966, 365 F.2d 90; Ward v. United States, D.C. Cir. 1961, 289 F.2d 877; United States v. Bova, 5th Cir. 1974, 493 F.2d 33. Kerner and Isaacs were properly joined in the counts based on the so-called bribery scheme because those counts reflected a series of transactions "constituting an offense or offenses." The propriety of that joinder would not validate joinder of independent counts against individual defendants. E.g., Ward v. United States, *supra*.

Grand Jury had heard the testimony of his principal witness, Kerner, and had concluded that it was wilfully false. Rule 14 is the proper vehicle for making the claim and for affording relief because Isaacs' witness was also his co-defendant.

The government is correct when it avers that this argument "is substantially identical to petitioner Kerner's argument for a separate trial of the perjury charge * * * *" (G.Br. 24; see I. Pet. 24) But, as we have carefully pointed out (I. Pet. 27-8), the prejudice arises not from the introduction of Kerner's allegedly false exculpatory statements, but from the awareness of the trial jury that the Grand Jury had already considered these same statements and found they were false.

3. Existence of scheme to defraud where only loss is the State's right to "honest and faithful" services. (G.Br. ¶ 2a)

Each of the authorities cited by the Government in response to our claim that the Mail Fraud statute does not encompass loss of intangibles involved actual loss to the alleged victim. Thus, for example, the public bribery cases (e.g., *Shushan* v. *United States,* 5 Cir. 1941, 117 F.2d 110; *United States* v. *Faser,* E.D.L.A. 1969, 303 F.Supp. 380) resulted in actual loss to the public body by reason of its payment of exorbitant fees or its loss of interest on bank deposits.

In this case, however, contrary to the claims of the Government (G.Br. 16-17), there was no showing that the State lost additional revenues from legislation allegedly favoring track operators, or that other racing associations were deprived of additional profits. In fact, Government witness Miller called the charge that he and Kerner facili-

tated the allocation of racing dates to the benefit of CTE and to the detriment of other associations, "preposterous." (Tr. 3254-5) Miller demonstrated that all racing associations prospered during Kerner's administration. (Tr. 3255) No racing dates were changed; no racing association, with the exception of Egyptian Enterprises, CTE's tenant, failed to receive the dates for which it applied. (Tr. 3274; Exs. 583-88; App. p. 15a)

Most importantly, however, the jury was instructed on the pure "loss of honest and faithful services" theory, thereby making it impossible to determine the grounds upon which the jury verdict rested. See *Yates* v. *United States*, 354 U.S. 298, 311-12 (1957); *Vitello* v. *United States*, 9 Cir. 1970, 425 F.2d 416, 419; *cf. Street* v. *New York*, 394 U.S. 576, 585-6 (1969).

4. Failure to instruct as to, and lack of proof of, intent to use interstate facilities. (G.Br. ¶ 3)

Despite the parenthetical nature of its observation that "the jury was instructed that to find a conspiracy to use the mails in furtherance of a scheme to defraud it must find, *inter alia*, that use of the mails was either contemplated by the conspirators or reasonably foreseeable" (G. Br. 19, n. 7), we assume that the Government's response is based essentially on an attempt to equate the element of "knowingly" using the mails with the element of "intending" to use the mails.[4]

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[4] We also assume, in view of its lack of response supporting the Opinion of the Court of Appeals that intent to use interstate facilities is unnecessary to a conspiracy to violate Section 1952, that the Government has abandoned this much of its argument below.

The Government incorrectly construes the instructions given below.[5] Judge Taylor, in delivering his charge, specifically told the jury:

> "It is not necessary that the use of the mails be contemplated by the scheme or that [the] defendant does any actual mailing or intends that the mails be used. It is sufficient to establish this element of crime if the mails were in fact used to carry out the scheme and that the use of the mails was reasonably foreseeable." (Tr. 7458)

He also told the jury:

> "It is not necessary that the use of the mails by the participants themselves be contemplated or that one of them do the actual mailing or that they consciously form in their minds a specific intent to use the mails in furtherance of the scheme. It is enough that the mails were in fact used to carry out the scheme and that such use by someone could reasonably be foreseen as a part of the execution of the scheme." (Tr. 7460)

Thus, Judge Taylor not only did not tell the jury that *intent* to use the mails was necessary to a conviction for conspiracy, he told them such intent was not necessary.

The Government, in its Brief, has confused the instructions given on knowledge—which is not in issue here—with the requested instructions on intent—which is the issue presented here. In view of the failure of the district judge to instruct that intent to use the mails, and intent to use interstate facilities, were essential elements of the conspiracy charge, this case falls squarely within the question presented by *United States* v. *Feola*, No. 73-1123, certiorari granted April 15, 1974.

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[5] This portion of the charge is attached as Appendix B. The charge, as given, plainly refers to the substantive counts. Nevertheless, the court also refused to instruct that intent to use the mails was an element of the conspiracy.

CONCLUSION

For the above and foregoing reasons, as well as for those applicable reasons set forth in the Petition of Otto Kerner, Jr., #73-1650, certiorari should be granted.

Respectfully submitted,

WARREN WOLFSON
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SHERMAN C. MAGIDSON
On the Brief

APPENDIX

APPENDIX A

Rule 8. Joinder of Offenses and of Defendants

(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

APPENDIX B

Instructions of the Court

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Count 1 of the indictment also charges a conspiracy to violate Section 1341, Title 18 of the United States Code, and Counts 6 through 13 charge eight specific violations of that section.

Section 1341, the relevant portions of which have been read to you, is known as the mail fraud statute. It makes unlawful the depositing in and receipt for or the causing of delivery by the United States mails any matter or thing for the purpose of executing a scheme or artifice to defraud. The mail fraud statute was enacted under the power of Congress to establish and operate the Post Office establishment of the United States. The purpose of the statute was to protect the public against intentional efforts

to despoil and prevent the Post Office from being used to carry them into effect.

The gist of this offense is the misuse of the mails to execute or attempt to execute a scheme to defraud. The existence of a scheme to defraud standing alone does not violate the statute, nor is it necessary that any person be defrauded. What is essential is the use of the mails in furtherance of such a scheme.

It is not necessary that the use of the mails be contemplated by the scheme or that defendant does any actual mailing or intends that the mails be used. It is sufficient to establish this element of crime if the mails were in fact used to carry out the scheme and that the use of the mails was reasonably foreseeable.

The mail matter need not disclose on its face a fraudulent representation or purpose, but need only be intended to assist in carrying out the scheme to defraud.

The mail fraud statute does not purport to reach all frauds, but is limited to those instances where the mails are used as a part of the execution of the fraud.

Before the defendant may be found guilty of mail fraud, the Government must prove beyond a reasonable doubt three essential elements:

One, that each of the defendants participated in a scheme to defraud;

Second, that their participation was accompanied by an intent to defraud; and

Third, that the mails were used in furtherance of that scheme or alleged scheme to defraud.

Section 1341 does not require that the defendant has personally deposited matter in the mail or has personally received the matter from the postal service.

Section 1341 imposes liability upon one who knowingly causes the mail to be used. An unintentional, insignificant

or incidental use of the mail is insufficient to support a conviction for violation of the mail fraud statutes, as is the use of the mail by a person or entity not associated with the scheme, unless such use of the mail could be reasonably foreseen as a likely step in the execution of the scheme.

It is not necessary that the use of the mails by the participants themselves be contemplated or that one of them do the actual mailing or that they consciously form in their minds a specific intent to use the mails in furtherance of the scheme. It is enough that the mails were in fact used to carry out the scheme and that such use by someone could reasonably be foreseen as a part of the execution of the scheme.

Use of the mails after the scheme had been completed or abandoned or for a purpose independent of the scheme is not a violation of the mail fraud statutes.

Good faith is a complete defense to the charge of violating the mail fraud statute. In determining whether defendant acted in good faith or with the intent to defraud, the jury should consider all the facts and circumstances in the case. If the jury finds that the defendant acted in good faith, he would not be guilty of a violation of the mail fraud statute.

The words "scheme" or "artifice" as used in the mail fraud statute mean any plan or course of action intended to defraud others or to obtain money or property by means of false or fraudulent pretenses, representations, or promises.

The bribery of a public official can be a scheme or artifice to defraud the public of public revenue, public property, public service.

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(Tr. 7457-7461)